DOCKET

PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-06154 CSV
SHORT TITLE Albanese, Charles M.
VERSUS Illinois

DOCKETED: Jan 29 1985

Date	Proceedings and Orders
Jan 29 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Mar 11 1985	Brief of respondent Illinois in opposition filed.
Mar 14 1985	DISTRIBUTED. March 29, 1985
Apr 5 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

RECEIVED
Jan. 29, 1985
JAN 31 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 84-6154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES M. ALBANESE, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

THEODORE A. GOTTFRIED
State Appellate Defender
Office of the State Appellate Defender
300 East Monroe, Suite 100
Springfield, IL 62701
(217) 782-7203

COUNSEL FOR PETITIONER

GARY S. RAPAPORT
Assistant Defender
Office of the State Appellate Defender
Supreme Court Unit
300 East Monroe, Suite 202
Springfield, IL 62701
(217) 782-1989

OF COUNSEL

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES M. ALBANESE, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

The petitioner, CHARLES M. ALBANESE, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois which held, over a dissent, that a sentence of death was properly imposed and that the Illinois death penalty statute does not violate the Eighth Amendment's proscription of cruel and unusual punishment.

QUESTION PRESENTED FOR REVIEW

I.

Is Illinois aggravating factor 9-1(b)3 unconstitutionally arbitrary as applied in this case, where the factor depended on the order of this and a related prosecution and would not have existed if the cases had gone to trial in opposite order?

II.

Does a death penalty statute violate the Eighth and Fourteenth Amendments by a provision which limits imposition of death sentences to defendants who do not require special provisions or assistance, such as sign language translation, to be fit for trial?

III.

Does the Illinois death penalty statute contain adequate safeguards against arbitrary or capricious imposition of capital punishment under Furman v. Georgia, 408 U.S. 238 (1972), given that the statute provides for a death penalty hearing at the complete discretion of the State's Attorney, which discretion is exercised after trial; that such discretion is exercised independently by the State's Attorneys of each of Illinois' 102 counties; and that the Illinois Supreme Court does not proportionally compare death penalty cases with cases where the death penalty was not requested or imposed?

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting Certiorari	
I. This Court should grant certiorari to determine whether Illinois aggravating factor 9-1(b)3 is unconstitutionally arbitrary as applied in this case, where the factor depended on the order of this and a related prosecution and would not have existed if the cases had gone to trial in opposite order	6
II. This Court should grant certiorari to consider whether a death penalty statute violates the Eighth and Fourteenth Amendments by a provision which limits imposition of death sentences to defendants who do not require special provisions or assistance, such as sign language translation, to be fit for trial	9
III. This Court should grant certiorari to consider whether the Illinois death penalty statute contains adequate safeguards against arbitrary or capricious imposition of capital punishment under Furman v. Georgia, 408 U.S. 238 (1972), given that the statute provides for a death penalty hearing at the complete discretion of the State's Attorney, which discretion is exercised after trial; that such discretion is exercised independently by the State's Attorneys of each of Illinois' 102 counties; and that the Illinois Supreme Court does not proportionally compare death penalty cases with cases where the death penalty was not requested or imposed	12
Conclusion	15
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1

TABLE OF AUTHORITIES

CASES	Page
Eddmonds v. Illinois, ___ U.S. ___, 36 Cr.L. 4031 (1984)	13
Furman v. Georgia, 408 U.S. 238 (1972)	6, 10, 12, 13
Godfrey v. Georgia, 446 U.S. 420 (1980)	6
People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1980)	12, 13
People v. Albanese, 102 Ill.2d 54, 464 N.E.2d 206 (1984)	6
People v. Free, 94 Ill.2d 378, 447 N.E.2d 218 (1983)	6
People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981)	13
People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261 (1984)	12
People v. Stewart, slip op. at 25 (Ill.S.Ct. Docket No. 56629, 10/19/84)	9
Pulley v. Harris, ___ U.S. ___, ___, 79 L.Ed.2d 29, 104 S.Ct. ___ (1984)	14
Zant v. Stephens, ___ U.S. ___, ___, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983)	6

CONSTITUTIONAL PROVISIONS

Eighth Amendment	6, 9
Fourteenth Amendment	6, 9

STATUTES

Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(b)3	6
Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(d)	12
Ill.Rev.Stat., 1981, Ch. 38, Sec. 104-22, 104-26(b)	9

OPINION BELOW

The opinion of the Supreme Court of Illinois is pending publication. The slip opinion is attached to this petition as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 19, 1984. (Appendix A) A petition for rehearing was denied on November 30, 1984. (Appendix B) This petition is being filed within sixty days of the Illinois Supreme Court's denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

Provision for convening a capital sentencing hearing following an Illinois defendant's conviction for murder is found in Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(d):

> (d) Separate sentencing hearing. Where requested by the State, the Court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c).

The statutory aggravating factor involved in this case is found in Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(b)(3):

> 3. The defendant has been convicted of murdering two or more individuals...

The limitation to the applicability of the death penalty statute at issue in this case is found in Ill.Rev.Stat., 1981, Ch. 38, Sec. 104-26(b):

> A defendant convicted following a trial under Section 104-22 shall not be subject to the death penalty.

That section, Ill.Rev.Stat., 1981, Ch. 38, Sec. 104-22, provides in pertinent part:

> Trial with special provisions and assistance.
>
> (a) On motion of the defendant, the State or on the court's own motion, the court shall determine whether special provisions or assistance will render the defendant fit to stand trial as defined in Section 104-10.
>
> (b) Such special provisions or assistance may include but are not limited to:
>
> (1) Appointment of qualified translators who shall simulaneously translate all testimony at trial into language understood by the defendant.
>
> (2) Appointment of experts qualified to assist a defendant who because of a disability is unable to understand the proceedings or communicate with his or her attorney.

IV.

STATEMENT OF THE CASE

Petitioner Charles Albanese was convicted by jury of the offense of murder and, after waiving the jury, was sentenced to death.

The statutory aggravating factor allowing a death sentence to be imposed was that Mr. Albanese had been "convicted" of two or more offenses of murder. Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(b)3. The other murder convictions relied upon had been returned in a separate case immediately prior to the trial and sentencing at bar. The case at bar was delayed until the completion of the other case by the prosecutors' deliberate manipulation, or by pure chance. Mr. Albanese contended in the Illinois Supreme Court that under these circumstances, the application of aggravating factor 9-1(b)3 in the instant case, that he had been "convicted" of other offenses of murder, was arbitrary and capricious in violation of the Eighth and Fourteenth Amendments because the factor would not have existed in this case but for the order of the two prosecutions. The Illinois Supreme Court held that whether the application of the statutory aggravating factor was capricious for these reasons did not implicate the Eighth and Fourteenth Amendments. (Appendix A at 14-15)

Mr. Albanese also contended in the Illinois Supreme Court that the Illinois statute violated the Eighth Amendment by limiting the applicability of capital punishment to those who, like Mr. Albanese, do not require sign language translators or

other such special assistance to be fit for trial. The Illinois Supreme Court's opinion contains no ruling on this specific contention, despite petitioner's briefs and rehearing petition on the point. (Relevant portions of those documents, showing that the issue was presented, are attached to this petition as Appendix C.) Instead, the opinion appears to rewrite petitioner's argument as alleging unconstitutionality solely with comparison to persons who simply do not speak or understand English. (Appendix A at 21-22)

Mr. Albanese also argued to the Illinois Supreme Court that the Illinois statute violated the Eighth and Fourteenth Amendments because of the broad, post-trial discretion granted each of Illinois' 102 State's Attorneys to seek or not seek capital punishment in murder cases. Over the dissent of Justice Simon, the court reaffirmed its previous opinions rejecting that contention. (Appendix A at 23, 29)

REASONS FOR GRANTING CERTIORARI

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER ILLINOIS AGGRAVATING FACTOR 9-1(b)3 IS UNCONSTITUTIONALLY ARBITRARY AS APPLIED IN THIS CASE, WHERE THE FACTOR DEPENDED ON THE ORDER OF THIS AND A RELATED PROSECUTION AND WOULD NOT HAVE EXISTED IF THE CASES HAD GONE TO TRIAL IN OPPOSITE ORDER.

Petitioner Charles Albanese was found eligible for a death sentence in the instant case by virtue of statutory aggravating factor 9-1(b)3, that he had been previously "convicted" of one or more offenses of murder. Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(b)3. The other convictions relied upon had been returned in another case immediately prior to the trial of this case. People v. Albanese, 102 Ill.2d 54, 464 N.E.2d 206 (1984), cert. denied, ___ U.S. ___. As can be seen, but for the order of the two prosecutions factor 9-1(b)3 would not have existed in the instant case because there would not have been any previous "convictions." Under the circumstances, Illinois aggravating factor 9-1(b)3 was applied in an arbitrary and capricious manner which violated the Eighth and Fourteenth Amendments.

The Illinois statute, like the Georgia death penalty statute, purports to satisfy the concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972), by requiring proof of one or more enumerated aggravating circumstances before a defendant can receive capital punishment. People v. Free, 94 Ill.2d 378, 447 N.E.2d 218, 242 (1983). This Court has held that under such a system, a particular statutory aggravating factor "must reasonably justify the imposition of a more severe sentence on the

defendant compared to others found guilty of murder." Zant v. Stephens, ___ U.S. ___, ___, 77 L.Ed.2d 235, 249-250, 103 S.Ct. 2733 (1983). The aggravating factor used must provide a "'principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not.'" ___ U.S. at ___, 77 L.Ed.2d at 250, citing Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Factor 9-1(b)3 does not satisfy those concerns in this case because its existence was determined by the prosecuting attorneys' manipulations, in seeing to it that the instant prosecution was delayed until "convictions" could be returned in the other case [1]; or if the prosecutors were not directly responsible, the existence of factor 9-1(b)3 depended fortuitously on the rates of progress of the two cases in their respective dockets. In either circumstance, whether the trial on the other charges against Mr. Albanese was finished by the time of the sentencing hearing in this case was completely unrelated to the nature of the instant offense or to Mr. Albanese's character and history, and bore no rational relationship to the question of whether Mr. Albanese was more deserving of capital punishment than other persons.

---

1 A local newspaper reported as follows:

> Asked why Lake County was going to the trouble and expense of trying an already-convicted Albanese again, [Assistant State's Attorney] McKoski responded: "If his first conviction should be reversed or if the death penalty were to be vacated, we want to have a second conviction on him as a backup. So if it is reversed, he will not be a free man."
>
> Waukegan News-Sun, October 11, 1982, Sec. A, pp. 1, 7.

Aggravating factor 9-1(b)3 clearly is intended to apply to persons guilty of more than one offense of murder. The factor is phrased in terms of prior convictions, however, which means that its existence in a given case depends on the judicial system having taken certain actions in other cases. This allows for the type of unconstitutional application which occurred in this case.

In light of the foregoing, this Court should grant certiorari and reverse the judgment of the Illinois Supreme Court on this issue. (Appendix A at 14-15)

II.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BY A PROVISION WHICH LIMITS IMPOSITION OF DEATH SENTENCES TO DEFENDANTS WHO DO NOT REQUIRE SPECIAL PROVISIONS OR ASSISTANCE, SUCH AS SIGN LANGUAGE TRANSLATION, TO BE FIT FOR TRIAL.

Illinois law provides that persons who require "special provisions or assistance" to be fit for trial, such as persons who require "communication by way of sign language, tactile-sense recognition and similar avenues," are not subject to the death penalty. Ill.Rev.Stat., 1981, Ch. 38, Sec. 104-22, 104-26(b); People v. Stewart, slip op. at 25 (Ill.S.Ct. Docket No. 56629, 10/19/84) (this portion of the Stewart opinion, which is awaiting publication, is attached to this petition as Appendix D). In the instant case the Illinois Supreme Court rejected petitioner Charles Albanese's contention that this discrimination, against persons not requiring special provisions or assistance to be fit for trial, violated the Eighth and Fourteenth Amendments. [2] (Appendix A at 21-22) This Court should grant certiorari and reverse the judgment of the Illinois court.

---

[2] The Illinois Supreme Court appears to have perceived Mr. Albanese's argument as claiming discrimination only with respect to individuals who are fit for trial but speak a language other than English, thus misconstruing the exemption at issue. (Appendix A at 21-22) Although Mr. Albanese did argue that such discrimination rendered his death sentence unconstitutional, he also argued specifically that his sentence was unconstitutional because a like sentence could not be considered for persons "who would require a sign language translator" or other such "assistance to understand the proceedings against them or assist in their defense." (Appendix C at 1, 2)

The distinction in the Illinois scheme between persons who do and persons who do not require special assistance to be fit for trial is selective and arbitrary. This distinction is unlike a death penalty statute's distinction between juvenile and adult offenders, for example, because it cannot support any rational legislative findings about the circumstances of an offender's crime or the culpability of his character and history. A death penalty scheme which utilizes such a distinction as a mandatory criterion for determining who may and who may not receive capital punishment is invalid under the Eighth and Fourteenth Amendments.

In Furman v. Georgia, 408 U.S. 238 (1972), Justice Douglas noted that the cruel and unusual punishment clause requires

> legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.
>
> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed.
>
> 408 U.S. at 256 (Douglas, J., concurring).

The Illinois distinction based on assisted or unassisted fitness to stand trial may not be so unpalatable, but it is selective and arbitrary in the same manner as distinctions based on race, education, income, popularity or stability. Justice Stewart reasoned in his concurring opinion that where the death penalty in imposed on some but not on others who are "just as reprehen-

sible," those death sentences amount to cruel and unusual punishment. Furman, 408 U.S. at 309-310 (Stewart, J., concurring). Persons who require special provisions or assistance to be fit for trial certainly may be "just as reprehensible" or worse than other persons.

For the above stated reasons, this Court should grant certiorari and reverse the judgment of the Illinois Supreme Court.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ILLINOIS DEATH PENALTY STATUTE CONTAINS ADEQUATE SAFEGUARDS AGAINST ARBITRARY OR CAPRICIOUS IMPOSITION OF CAPITAL PUNISHMENT UNDER FURMAN V. GEORGIA, 408 U.S. 238 (1972), GIVEN THAT THE ILLINOIS STATUTE PROVIDES FOR A DEATH PENALTY HEARING AT THE COMPLETE DISCRETION OF THE STATE'S ATTORNEY, WHICH DISCRETION IS EXERCISED AFTER TRIAL; THAT SUCH DISCRETION IS EXERCISED INDEPENDENTLY BY THE STATE'S ATTORNEYS OF EACH OF ILLINOIS' 102 COUNTIES; AND THAT THE ILLINOIS SUPREME COURT DOES NOT PROPORTIONALLY COMPARE DEATH PENALTY CASES WITH CASES WHERE THE DEATH PENALTY WAS NOT REQUESTED OR IMPOSED.

The Illinois death penalty statute under which petitioner Charles Albanese was sentenced provides that a death sentencing hearing will follow a conviction for the offense of murder "[w]here requested by the State." Ill.Rev.Stat., 1981, Ch. 38, Sec. 9-1(d). The statute sets no guidelines for the prosecutor's decision to request or not request a death penalty hearing. The prosecutor's decision will be based on whether he thinks he can prevail, and whether he personally wishes to proceed. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809, 815 (1980); 397 N.E.2d at 820-823 (Ryan, J., dissenting). The statute confers this discretion upon the State's Attorney in each of the 102 counties in Illinois. Cousins, 397 N.E.2d at 822 (Ryan, J., dissenting). The statute does not require comparative proportionality review of death sentences on appeal, and the Illinois Supreme Court compares death penalty cases before it only with death penalty cases it has previously reviewed. People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261, 273 (1984).

The Illinois Supreme Court in the instant case adhered to its previous decisions that these features of the Illinois death

penalty scheme did not render the statute unconstitutional under Furman v. Georgia, 408 U.S. 238 (1972), for allowing a risk of arbitrary and capricious imposition of capital punishment. (Appendix A at 23) This Court should grant certiorari and reverse the ruling of the Illinois Supreme Court.

The State's freewheeling discretion to seek or not seek the death penalty after obtaining a conviction for murder, exercised differently in each of Illinois' 102 counties, creates an intolerable risk of arbitrary and capricious death sentences and renders the Illinois statute unconstitutional under Furman v. Georgia. Eddmonds v. Illinois, ___ U.S. ___, 36 Cr.L. 4031 (1984) (Marshall and Brennan, JJ., dissenting from denial of certiorari); People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809, 819-824 (1979) (Ryan, J., Goldenhersh, CJ., and Clark, J., dissenting); People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346, 1370-1377 (1981) (Simon, J., dissenting). [3]

The Illinois Supreme Court does not conduct a thorough comparative proportionality review of death sentences that could eliminate the risk of arbitrary and capricious executions.

---

[3] This Court may observe that four of the seven members of the Illinois Supreme Court have expressed their agreement with petitioner Albanese's position. Only Justices Ryan, Goldenhersh and Clark were members of the court when the issue was first considered, however, and their viewpoint did not prevail. People ex rel. v. Carey v. Cousins. In subsequent cases, these justices have reversed their position on the sole basis of stare decisis. People v. Lewis, 430 N.E.2d at 1363-1366 (separate concurring opinions of Goldenhersh, CJ., Ryan, J., and Clark, J.); Appendix A at 24-29 (separate concurring opinions of Ryan, CJ., and Clark, J.). These justices have not altered their positions on the merits of the issue of prosecutorial discretion and consider it inevitable that this Court must eventually rule on it. (Appendix A at 25-26, Ryan, CJ., concurring).

See Pulley v. Harris, ___ U.S. ___, ___, 79 L.Ed.2d 29, 41, 104 S.Ct. ___ (1984). Although the Illinois court does compare death penalty cases before it with death penalty cases it has previously considered, it does not compare them with cases where the death penalty was not requested or imposed. Consequently the comparative review which the Illinois Supreme Court undertakes does not check the arbitrariness and capriciousness in the State's Attorneys' choices to pursue capital punishment in some cases and not in others.

For the above stated reasons this Court should grant certiorari and reverse the judgment of the Illinois Supreme Court.

CONCLUSION

For the foregoing reasons, CHARLES M. ALBANESE, petitioner, respectfully requests that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

Theodore A. Gottfried

THEODORE A. GOTTFRIED
State Appellate Defender
Office of the State Appellate Defender
300 East Monroe, Suite 100
Springfield, IL 62701
(217) 782-7203

COUNSEL FOR PETITIONER

GARY S. RAPAPORT
Assistant Defender
Office of the State Appellate Defender
Supreme Court Unit
300 East Monroe, Suite 202
Springfield, IL 62701
(217) 782-1989

OF COUNSEL

APPENDIX A

Docket No. 57660—Agenda 2—May 1984.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. CHARLES M. ALBANESE, Appellant.

JUSTICE UNDERWOOD delivered the opinion of the court:

In a jury trial in the circuit court of Lake County, defendant, Charles Albanese, was found guilty of the arsenic-poisoning murder of his mother-in-law, Marion Mueller. Pursuant to section 9—1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 9—1(d)), the court conducted a separate sentencing hearing to determine whether a sentence of death should be imposed, and defendant was subsequently sentenced to death. The trial court stayed imposition of the sentence (87 Ill. 2d R. 609(a)) pending direct appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); Ill. Rev. Stat. 1981, ch. 38, par. 9—1(i); 87 Ill. 2d R. 603).

The evidence admitted in this case is substantially similar to that introduced in another case involving defendant (see *People v. Albanese* (1984), 102 Ill. 2d 54; hereinafter *Albanese I*), and will not be discussed in any detail. In *Albanese I*, defendant was convicted of murdering his father, M. J. Albanese, and his wife's grandmother, Mary Lambert, by arsenic poisoning; the attempted murder of his brother, Michael Albanese, by the same means; and the theft of property from the family business. He was sentenced to death on the murder charges, and we affirmed that judgment in *Albanese I*. The evidence in this case differs from that admitted there in that, in the guilt phase of this trial, no evidence related to the murder of defendant's father, the attempted murder of his brother, or the theft charges was admitted, and defendant did not testify at this phase, as he did in *Albanese I*. Also, evidence admitted here pertaining to defendant's scheme to have his cellmate, John Saltz, force Michael Albanese to sign a note confessing to all of the previously mentioned crimes and then murder Michael and his wife was not available at the time of the first trial.

Defendant argues that the evidence presented was insufficient to prove him guilty beyond a reasonable doubt, challenging the sufficiency of the State's evidence that he murdered Marion Mueller to obtain, through his wife, an inheritance that would ease the financial strain he was experiencing. In particular, he disputes the accuracy of the

FILED
OCT 19 1984
CLERK SUPREME COURT

State's evidence assessing his financial condition in 1980, urging the court to adopt calculations he offers here for the first time, which produce an increase in his cash assets and a decrease in expenses. However, as defendant acknowledges, the revised financial data do not alter the result that he overspent his income in 1980. Moreover, his revisions do not detract in any way from the State's evidence summarizing defendant's obligations and arrears in the critical months of July and August of 1980. As for defendant's more general argument that all of the circumstantial evidence submitted failed to prove his guilt beyond a reasonable doubt, we believe, as we stated in *Albanese I*, that the State has clearly established that Charles Albanese plotted and carried out this murder for financial gain. "A conviction can be sustained upon circumstantial evidence as well as upon direct, and to prove guilt beyond a reasonable doubt does not mean that the jury must disregard the inferences that flow normally from the evidence before it." *People v. Williams* (1968), 40 Ill. 2d 522, 526, *cert. denied* (1969), 393 U.S. 1123, 22 L. Ed. 2d 129, 89 S. Ct. 1004.

Defendant also contends that the State was erroneously permitted to introduce evidence of his financial problems and relies chiefly on *People v. Dorr* (1931), 346 Ill. 295, to support this proposition. In *Dorr*, the court stated that evidence of pecuniary embarrassment should have been excluded because: "A person's lack of money or even insolvency, *without other incriminating facts or circumstances*, does not justify the suspicion that, to improve his financial condition, he will commit one of the graver crimes of violence." (Emphasis added.) (346 Ill. 295, 302.) Defendant did not object at trial or in his post-trial motion to the admission of evidence concerning his strained finances, and thus any claim of error in this regard would normally be considered waived. However, even if there had been no waiver, we find that evidence of defendant's financial problems was properly admitted under the rule in *Dorr* since there was a considerable amount of other incriminating evidence introduced to support the conclusion that defendant murdered Marion Mueller. That evidence includes defendant's initial denial to McHenry police that he had ever possessed arsenic; his conviction for the murder of Mary Lambert, whose death prior to Marion Mueller's enabled his wife to inherit valuable real estate jointly owned by the two victims; the promptness with which the victims' assets were used to pay defendant's debts; defendant's scheme whereby a former cellmate

mailed letters, actually authored by defendant, but written as though from an anonymous third party, which implicated his brother and others in the crimes with which defendant had been charged; and his plot to have his brother murdered after he had been forced to sign a letter confessing to defendant's crimes.

Defendant further argues that evidence of other crimes committed by him, unrelated to the murder of Marion Mueller, was improperly admitted, thereby denying him a fair trial. He maintains that evidence of the following crimes was admitted in error: the attempted murder of his brother, Michael Albanese; theft of property from the family business; wilful withholding of child-support payments; and solicitation of the murder of his brother and sister-in-law. The first two arguments, relating to the admission of evidence of attempted murder and theft, are apparently based on the admission of two exculpatory notes he authored while in jail: a note, supposedly from an anonymous third party, circulated by his cellmate in McHenry County jail, Marty Nathan, and the "suicide" note his cellmate in Lake County jail, John Saltz, was to force defendant's brother to copy. The Nathan note states, in relevant part:

> "*** The container Joe [Reichel] gave Charles had powder[ed] sugar with a little arsenic. Just enough to kill the animals. Mike almost took to[o] much by trying to make himself look like a victim. *** Mike set up the phoney [*sic*] theft."

The Saltz note contains the following relevant passage:

> "*** I took arsenic myself to make Chuck look guilty [*sic*]. But I overdid it and now I'll never be the same. The sale of zinc and scrap was actually my idea. But I had him do it in a way that I could make mom believe Chuck did it alone. ***"

Since the trial court had granted defendant's motion *in limine* to exclude any evidence connected with his attempted murder of his brother by use of arsenic or the theft of company property, those facts necessary to fully decipher the meaning of these notes were not before the jury. In the absence of those explanatory facts, it seems to us the information contained in these notes simply does not implicate defendant in either an attempted murder or a theft. Nor is there in this record any evidence that defendant wilfully withheld child-support payments due his former wife; on the contrary, the evidence indicates that he was experiencing a cash shortage which made it impossible for him to comply

with the terms of his divorce decree. Although section 1 of the Non-Support of Spouse and Children Act (Ill. Rev. Stat. 1979, ch. 40, par. 1101) makes it a misdemeanor to refuse to support one's children without lawful excuse, decisional law interpreting this statute indicates that inability to pay may provide the lawful excuse contemplated by this section. (See *People v. James* (1980), 89 Ill. App. 3d 157, 159.) Moreover, it is not common knowledge that it is a misdemeanor to neglect support obligations, and jurors were never so advised. Attorney Eugene Buchalter did testify that defendant was seized by the McHenry County sheriff pursuant to a body attachment issued by the court, but he stated that he requested this order so that defendant would appear in court on a rule to show cause. Thus, the first three matters which defendant contends were improperly admitted simply do not constitute evidence that defendant committed other crimes.

It is clear, however, that evidence concerning defendant's solicitation of John Saltz to murder his brother and sister-in-law was before the jury since Saltz testified to this effect. Evidence of collateral crimes is inadmissible if it is relevant merely to establish the defendant's propensity to commit crimes. (*People v. Bartall* (1983), 98 Ill. 2d 294, 309; *People v. Lindgren* (1980), 79 Ill. 2d 129, 137.) The issue then is whether Saltz' testimony was admitted only to establish defendant's reputation as a bad person, deserving of punishment, or whether there was some other, legitimate purpose for its admission. We believe that the solicitation-of-murder evidence was properly before the jury because it represented the ultimate step in defendant's plan to fabricate exculpatory evidence and, as such, constituted evidence of defendant's consciousness of guilt. (See *United States v. Rajewski* (7th Cir. 1975), 526 F.2d 149, 158.) The scheme to have Saltz force Michael to sign a "suicide" note confessing to defendant's crimes would not have been complete if the two persons who, according to the note, were supposed to be committing suicide out of remorse for their misdeeds, remained alive.

Defendant urges that the trial court erred in permitting Rudolph Schaefer, an accountant who testified for the State as an expert witness, to state, over defendant's objection, his opinion that in July and August of 1980, defendant and Virginia Albanese were in "a very critical financial condition ***[,] [a]s evidenced by an acute shortage of cash." Defendant contends that such a statement constituted prejudicial error because it usurped the fact-finding function of the jury

and maintains that our resolution of this same question in favor of the State in *Albanese I* is not controlling here for several reasons. He argues that the expert testimony in this case is distinguishable because it analyzed the Albanese family finances for a shorter time period than in *Albanese I;* it was not balanced by an expert witness to challenge Schaefer's opinion as in *Albanese I*; and it had a greater potential to cause prejudicial error here, where the prosecution's case did not include evidence from *Albanese I* of defendant's convictions for the murder of his father and for the attempted murder of his brother. Although we agree with defendant that the presentation of the expert testimony in the two cases was not identical, the variances do not warrant departing from our holding in *Albanese I.* We there relied on *Miller v. Pillsbury Co.* (1965), 33 Ill. 2d 514, which states: "[T]he trend is to permit expert testimony in matters which are complicated and outside the knowledge or understanding of the average person, and even as to matters of common knowledge and understanding where difficult of comprehension and explanation. The jury still may accept or reject such testimony." 33 Ill. 2d 514, 516.

Defendant next contends that he was denied a fair trial because the prosecutor's closing argument was improper, and he cites five different comments, only one of which was objected to at trial, which he urges constitute reversible error. Any error related to the four comments to which no objections were made would normally be considered waived unless the comments were so inflammatory that defendant could not have received a fair trial or so flagrant as to threaten deterioration of the judicial process. (*People v. Owens* (1984), 102 Ill. 2d 88, 104.) We will first examine the four comments to which no objections were made.

Defendant contends that the prosecutor asserted facts not in evidence when he made the following statements:

> "Who do the facts show had arsenic? The defendant. Only one other person does any fact [show] had arsenic and that was Joe Reichel, the one who *** gave it to the defendant. Joe Reichel never met Mary Lambert or Marion Mueller. The only other one with arsenic that never met them and certainly he didn't get anything when they died, like the defendant got $70,000. Could it be contended that Joe Reichel snuck [*sic*] in to Mary Lambert's house and spread a little arsenic in something and snuck [*sic*] out? For no reason? No. And he's the only other one that had any arsenic."

In rebuttal, the prosecutor also stated:

> "The only evidence you heard of anyone in possession of arsenic was the defendant, Charles Albanese."

Defendant relies upon *People v. Beier* (1963), 29 Ill. 2d 511, 517, for the proposition, which we do not question, that the prosecution may not argue assumptions and statements of fact not based upon any evidence. He maintains that, since at one point the prosecutor identified Joe Reichel as "the only other one that had any arsenic," the argument was improper under *Beier* because the evidence that Joe Reichel and defendant possessed arsenic did not eliminate the possibility that Virginia Albanese, Michael Albanese, or the victims themselves may also have had access to this substance. *Beier* only requires the prosecutor to refrain from commenting on facts not in evidence; here, the only evidence concerned with arsenic possession indicated that just two persons, Joe Reichel and defendant, had any. The prosecution was not required to balance its closing argument by mentioning that the State had failed to prove that no other persons possessed arsenic.

Defendant also contends that the prosecution twice misstated the evidence., He urges that one such misstatement occurred when the prosecutor commented that defendant was "in jail" for failure to pay child support. The testimony of Eugene Buchalter, attorney for defendant's former wife, established that he obtained a body attachment for defendant after he had failed to appear at two hearings on a rule to show cause as to why he should not be held in contempt for failure to pay the child support and alimony required by court decree. Attorney Buchalter's testimony also indicated that the sheriff of McHenry County brought defendant into custody and that he was not released until his attorney contacted Mr. Buchalter and persuaded him to ask the court for an order directing the sheriff to do so. The record does not reveal the precise time period defendant was in the sheriff's custody, but it could reasonably have been inferred that defendant was in jail part of the time he was in custody. A prosecutor's statement based on a legitimate inference from the proof does not constitute improper argument. (*People v. Owens* (1984), 102 Ill. 2d 88, 105.) The same rule applies to defendant's contention that the prosecution misstated the facts when he argued that the only source for defendant's funds to pay the overdue child support and alimony was the death of either Marion Mueller or Mary Lambert. The $3,600 payment to defendant's previous wife was made by a check written on August 4, 1980, and post-dated August 15.

Defendant cites the testimony of Virginia Albanese as conclusive evidence that the money for this payment came from a loan from a joint bank account she and her mother shared. The testimony of Terry Schetter, assistant cashier at Fox Lake State Bank, and other documentary evidence support the theory that the only source for a loan of this amount at this particular time would have been the close-out, on August 6, 1980, of the joint savings account shared by Mary Lambert and Marion Mueller. Since this loan, or gift, was not made until the date of Mary Lambert's death, the prosecutor could reasonably infer that no funds were available until her demise.

Defendant further asserts that the following rebuttal comments suggested to jurors that he was withholding incriminating evidence:

> "He wants to make an issue out of the fact that Frank Lambert had the same symptoms as the deceased in this case. Maybe he knows something that we don't know. Maybe Frank Lambert somehow was at the defendant's house. Maybe Frank Lambert ate something that he shouldn't have at the defendant's house."

This argument, however, was a legitimate response to defense counsel's argument that the State's case against defendant failed to account for the illness of Marion Mueller's brother, Frank Lambert, who was hospitalized for symptoms similar to those suffered by his sister and mother. *People v. Dixon* (1982), 91 Ill. 2d 346, 350-51.

Next, defendant urges that certain of the prosecutor's rebuttal remarks blatantly appealed to the sympathies and fears of jurors. In concluding his rebuttal, the assistant State's Attorney remarked:

> "Those two women that died, and the one in this matter, Marion Mueller, lived in a retirement village. They were old, for the most part, but they still had a life left to live, they had friends, they had loved ones, they had their shopping excursions and it's not up to anyone to say someone is to die or when that person is to die. It's not up to Charles Albanese to say there's no more life left for those people because he has financial problems, because he can't handle his problems."

These comments, which dwell upon the evil results of crime, are not improper. See *People v. Owens* (1984), 102 Ill. 2d 88, 105-06, and cases cited therein.

The foregoing comments, to which no trial objections were made, are within the bounds of proper closing argument and fall far short of meeting either of the standards

cited in *Owens*. Accordingly, we turn to the comments to which defendant did object at trial, based on his contention that they amounted to a shifting of the burden of proof. The following exchange occurred during rebuttal:

> "MR. DUFFY [assistant State's Attorney]: Counsel would also make an issue out of the fact that there are some things the State cannot introduce in this case. You heard testimony of that over a week. There's no evidence of a first autopsy, he says. There's no protocol, there's no pathologists testifying here. But the defendant, as every defendant in a criminal case, through his counsel has subpoena power and don't for a minute think that if there's one piece of evidence the defendant didn't think would be helpful to him, you wouldn't get to see it. He can subpoena that pathologist if he likes. He can get —
>
> MR. KELLY [defense counsel]: Objection. I think he's shifting the burden of proof by his comments.
>
> MR. DUFFY: I'm not shifting, Judge. I'm replying to his argument.
>
> THE COURT: But you can't shift the burden of proof.
>
> MR. DUFFY: I agree. But I'm not.
>
> THE COURT: Proceed.
>
> MR. DUFFY: If those tracings helped him, he can subpoena anybody or any document that he wishes to testify here before you. The tracings aren't going to help. The tracings merely say the same thing that everybody else said. Mr. Principe, the Executive Director of the Northern Illinois Crime Lab [,] told you that he conducted the tests and he determined the presence of arsenic. The tracing was a documentation that signifies that particular fact."

We are of the opinion that the trial judge did not rule improperly. The comments here differ greatly from those in *People v. Weinstein* (1966), 35 Ill. 2d 467, 469-70, upon which defendant relies. In *Weinstein*, we reversed and remanded for a new trial because the prosecutor repeatedly stated that it was the burden of the defendant to present evidence creating a reasonable doubt of guilt. The prosecutor here did not state that defendant must provide the evidence that would create a reasonable doubt as to his guilt; rather, he pointed to defendant's failure to submit any evidence that would tend to refute the case against him. Such a comment is within the bounds of proper argument. See *People v. Kubat* (1983), 94 Ill. 2d 437, 497; *People v. Blakes* (1976), 63 Ill. 2d 354, 359-60.

Defendant further argues that excluding jurors pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, results in a jury that is prone to convict,

violating defendant's sixth amendment right to an impartial jury made applicable to the States by the fourteenth amendment. Although he acknowledges that our court's decisions have consistently rejected this argument (see, *e.g.*, *People v. Albanese* (1984), 102 Ill. 2d 54, 80; *People v. Davis* (1983), 95 Ill. 2d 1, 18, *cert. denied* (1983), ___ U.S. ___, 78 L. Ed. 2d 697, 104 S. Ct. 507; *People v. Tiller* (1982), 94 Ill. 2d 303, 322, *cert. denied* (1983), ___ U.S. ___, 77 L. Ed. 2d 1302, 103 S. Ct. 2121-22; *People v. Lewis* (1981), 88 Ill. 2d 129, 147, *cert. denied* (1982), 456 U.S. 1011, 73 L. Ed. 2d 1308, 102 S. Ct. 2307), defendant urges reversal of his conviction on this basis. We see no need for further discussion of this question.

In related argumenta, defendant contends that the very process of *Witherspoon* questioning leads to a more conviction-prone jury because it enables prosecutors to peremptorily remove potential jurors who express tentative opposition to the death penalty in addition to excusing for cause those who unalterably oppose it, and because mere exposure to this type of questioning convinces jurors of defendant's guilt. We cannot accept these arguments without rejecting the very form of questioning which the Supreme Court approved in *Witherspoon*, a decision recently reaffirmed in *Maggio v. Williams* (1983), ___ U.S. ___, 78 L. Ed. 2d 43, 104 S. Ct. 311, and *Adams v. Texas* (1980), 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521. Defendant also contends that jurors exposed to the *Witherspoon*-qualification process become convinced that our criminal justice system disapproves of opposition to the death penalty after seeing others in the venire excused for cause due to an inability to impose a death sentence, thus making this form of punishment appear more appropriate than a prison sentence. He urges that since five prospective jurors and two prospective alternate jurors were excused for cause under *Witherspoon* and two more members of the venire were peremptorily removed, apparently on related grounds, the jurors selected to serve were so indoctrinated in the correctness of imposing the death penalty that they could not constitute the impartial jury the sixth amendment requires. This argument cannot succeed since, as noted above, the Supreme Court continues to approve *Witherspoon* questioning. Moreover, the argument is irrelevant here for two reasons. First the court, rather than the jury, made the sentencing decision in this case. Second, the individualized questioning concerning potential imposition of the death penalty and other matters

was conducted outside the presence of all other members of the venire so that those selected as jurors did not have the opportunity to listen to juror dismissals for cause on *Witherspoon* grounds or related peremptory challenges.

Defendant also contends that even if the allegations of error previously examined were deemed harmless when considered individually, their cumulative effect was to deny him a fair trial. Having concluded that none of the points relied upon by defendant constituted error, logic dictates that there is no possibility for cumulative error.

Defendant further argues that he was denied effective assistance of counsel in violation of the sixth amendment due to certain acts or omissions of counsel. He urges that each of these alleged errors was of such magnitude as to satisfy both the standard this court has used to evaluate alleged deficiencies in representation (*People v. Greer* (1980), 79 Ill. 2d 103, 120-21 (actual incompetence of counsel entitles defendant to a new trial if the incompetence created such substantial prejudice that the trial result probably would have been different)) and the standard enunciated in *United States ex rel. Williams v. Twomey* (7th Cir. 1975), 510 F.2d 634, 641 (sixth amendment entitles defendants to representation that meets minimum standards of professional representation), upon which he relies.

The Supreme Court, in *Strickland v. Washington* (1984), ___ U.S. ___, 80 L. Ed. 2d 674, 104 S. Ct. 2052, recently adopted a standard which appears to combine elements of both *Greer* and *Twomey*. The court held that the constitutionally guaranteed assistance of counsel has not been provided if the defendant can prove that counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to "deprive the defendant of a fair trial, a trial whose result is reliable." (___ U.S. ___, ___, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064.) The court also indicated a defendant must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (___ U.S. ___, ___, 80 L. Ed. 2d 674, 698, 104 S. Ct. 2052, 2068.) Emphasizing that the defendant must prove prejudice, the court stated: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (___ U.S. ___, ___, 80 L. Ed. 2d 674, 692-93, 104 S. Ct. 2052, 2064.) The

court also directed that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." ___ U.S. ___, ___, 80 L. Ed. 2d 674, 694, 104 S. Ct. 2052, 2065.

The court made the following cogent observations:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac* [(1982), 456 U.S. 107, 133-34, 71 L. Ed. 2d 783, 804, 102 S. Ct. 1558, 1575]. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [*See Michel v. Louisiana* (1968), 350 U.S. 91, 101, 100 L. Ed. 83, 93, 76 S. Ct. 158, 164.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases [58 N.Y.U. L. Rev. 299, 343 (1983)].
>
> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." (___ U.S. ___, ___, 80 L. Ed. 2d 674, 694-95, 104 S. Ct. 2052, 2065-66.)

Although we do not foresee that application of the *Strickland* rule will produce results that vary significantly from those reached under *Greer*, we hereby adopt the Supreme Court rule for challenges to effectiveness of both retained and appointed counsel (see *People v. Royse* (1983), 99 Ill. 2d

163, 170) and reject the single-component test of *Twomey*.

To assist lower courts, the Supreme Court also offered the following guidelines for applying its two-component standard: "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." ___ U.S. ___, ___, 80 L. Ed. 2d 674, 699, 104 S. Ct. 2052, 2069-70.

In this case, defendant urges that his trial counsel erred in (1) eliciting, acquiescing in, and stipulating to evidence that tended to indicate arsenic-poisoning deaths are more often the result of homicide than of any other cause; (2) failing to object to evidence of defendant's finances and to references to other crimes in the confession and suicide notes; (3) failing to object to a statement in closing argument that defendant had been jailed for failure to pay child support; and (4) failing to examine the State's financial exhibits in sufficient detail to expose alleged flaws in testimony from the State's financial expert. Defendant submits that he probably would not have been convicted had his attorney not committed these alleged errors. We disagree, for our review of the record demonstrates that even assuming, *arguendo*, that all of the alleged errors constitute substandard representation, they would not have altered the result in this case. There is, therefore, no need to review the individual claims of inadequate representation to determine whether counsel acted within the range of reasonable professional assistance.

Next, defendant makes four related arguments pertaining to the State's decision to bring separate prosecutions for the murders of Mary Lambert and Marion Mueller. Defendant was convicted and sentenced to death for the murders of Mary Lambert and M. J. Albanese in *Albanese I*. He urges reversal of his conviction in this case or, in the alternative, vacation of the death sentence, based on the first two arguments, which are grounded in sections 3—3(b) and 3—4(b)(1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, pars. 3—3(b), 3—4(b)(1)).

Section 3—3 provides:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately." (Ill. Rev. Stat. 1979, ch. 38, par. 3—3.)

Defendant argues that section 3—3(b) required the State to bring a single prosecution for the murders of Marion Mueller and Mary Lambert. To support this argument, defendant points to the similarities between the prosecutions at issue here and the facts in *Ciucci v. Illinois* (1958), 356 U.S. 571, 2 L. Ed. 2d 983, 78 S. Ct. 839, a decision which is generally credited with prompting the legislature to enact section 3—3 (*People v. Golson* (1965), 32 Ill. 2d 398, 411). In *Ciucci*, defendant shot and killed his wife and three children in the same incident and was charged in four separate indictments. He was tried three times: at the first two trials, involving the deaths of his wife and one child, he received prison sentences; at the third trial, for the murder of the second child, he received the death sentence. The Supreme Court held that the record indicated no due process violations, although it was argued that the successive prosecutions were fundamentally unfair, since evidence of the entire occurrence was relevant in each of the three trials and since the prosecutor had announced to the press his plan of prosecuting the defendant until he obtained a death sentence. Defendant's attempt to align his murder prosecutions with the facts in *Ciucci* is of no avail, however, because, although *Ciucci* may have prompted the legislation upon which he relies, the committee comments to section 3—3 make it clear that this statute would not have required a single prosecution in the *Ciucci* case or in any other multiple-murder case:

"Section 3—3 is not intended to cover the situation in which several offenses—either repeated violations of the same statutory provision or violations of different provisions—arise from a series of acts which are closely related with respect to the offender's single purpose or plan. Many possible combinations of this sort are possible, but some of the common instances are the multiple-assault or multiple-murder situation, as in the Ciucci case ***." Ill. Ann. Stat., ch. 38, par. 3—3, Committee Comments, at 202 (Smith-Hurd 1972).

Defendant's reliance on section 3—4(b)(1) is similarly misplaced. He urges that he could have been convicted for the offense of murdering Marion Mueller in *Albanese I* since virtually the same evidence was used in the second prosecution as in the first, and so the subsequent prosecution was barred. Section 3—4(b)(1) provides:

"(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; ***" (Ill. Rev. Stat. 1979, ch. 38, par. 3—4(b)(1).)

Again, the committee comments indicate just the opposite:

"Subsection 3—4(b). *** If the new offense charged is one on which the defendant could have been convicted on the former prosecution, the second prosecution is barred. For example, a former conviction or acquittal of murder would bar a subsequent prosecution for manslaughter, assault with intent to murder (People v. Dugas, 310 Ill. 291, 141 N.E. 769 (1923)); or assault and battery, based on the same conduct with respect to the same victim; *but not on the same conduct with respect to a different victim (People v. Stephens, 297 Ill. 91, 130 N.E. 459 (1929)), even if the offenses charged are violations of the same statute, committed at the same time (see People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1937) for an analogous situation).*" (Emphasis added.) (Ill. Ann. Stat., ch. 38, par. 3—4, Committee Comments, at 217 (Smith-Hurd 1972).)

The committee's explicit adoption of the court's decisions in *Stephens* and *Allen* leaves no doubt that two prosecutions were permissible. Thus, defendant's two statutory arguments provide no basis for reversing his conviction or, alternatively, vacating the death sentence.

In his third argument pertaining to the separate prosecutions defendant contends that his death sentence, which was predicated on the section 9—1(b)(3) statutory aggravating factor of multiple-murder convictions, must be vacated because application of this factor on the facts of his case resulted in a death sentence that was imposed in an arbitrary and capricious manner. He correctly observes that if the trial in this case had concluded prior to the trial in *Albanese I*, instead of the reverse, he would not have been eligible for the death penalty under section 9—1(b)(3) in this case since there would have been only one murder conviction against him at that time. Having posited this alternative sequence of

events, defendant contends that imposing the death penalty here is arbitrary and capricious in violation of the eighth and fourteenth amendments because he became eligible for it in this case only because *Albanese I* happened to progress more rapidly than this prosecution.

Although we agree with defendant that the order in which the two cases were tried was dependent upon chance factors, this fact alone does not elevate his argument to one of constitutional magnitude. As this court noted in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 541, *cert. denied* (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603, the meaning of the phrase "arbitrary and capricious" as used in the *Furman* decision was more fully explained by Justice Stewart in his plurality opinion in *Gregg v. Georgia* (1976), 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909, where he wrote:

> "[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of the sentence and provided with standards to guide its use of the information." (428 U.S. 153, 195, 49 L. Ed. 2d 859, 887, 96 S. Ct. 2909, 2935.)

(See also *Barclay v. Florida* (1983), ___ U.S. ___, ___, 77 L. Ed. 2d 1134, 1144, 103 S. Ct. 3418, 3424; *Proffitt v. Florida* (1976), 428 U.S. 242, 258, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969.) The decisions of the United States Supreme Court focus not on the procedures by which capital cases reach the trial court, which would be virtually impossible to review, but rather on the decision-making process of the sentencing body once the trial on guilt is concluded. Since our death penalty statute suitably restricts the discretion of the sentencing authority (*People v. Free* (1983), 94 Ill. 2d 378, 427, *cert. denied* (1983), ___ U.S. ___, 78 L. Ed. 2d 175, 104 S. Ct. 200), there is no basis for vacating defendant's sentence on the grounds that it was imposed in violation of the eighth amendment ban against cruel and unusual punishment.

Defendant's final argument concerning the separate prosecutions charges that prosecutors manipulated the dockets in the two cases and thus contributed to the alleged arbitrary and capricious nature of his death sentence here. Although we have already held that an eighth amendment arbitrary and capricious analysis should focus on the sentencing process rather than the manner in which a case goes to trial, we will briefly examine this argument since it essentially charges the prosecutors with professional impropriety. See 87 Ill. 2d Canon 9.

Defendant has appended to his briefs a newspaper article, which quotes a Lake County assistant State's Attorney responding to the question of why Lake County "was going to the trouble and expense of trying an already-convicted Albanese again" in the following manner:

> "If his conviction should be reversed or if the death penalty were to be vacated, we want to have a second conviction on him as a backup. So if it is reversed, he will not be a free man." Waukegan News-Sun, Oct. 11, 1982.

This statement, a response to an inquiry as to why more public funds should be spent on a second trial of a defendant already sentenced to death, was entirely proper and fails to establish any attempt to manipulate dockets so that *Albanese I* would go to trial first. The record in this case does reveal, however, that a Lake County grand jury returned an indictment against defendant for the murders of both Mary Lambert and Marion Mueller and that the charges against him for the death of the former were nol-prossed before trial of this case. Since defendant was indicted and convicted of murdering Mary Lambert in *Albanese I*, it may be inferred that at some point the State's Attorneys decided to include the Mary Lambert murder charge in *Albanese I* and to prosecute separately on the Marion Mueller charge. Sections 3—3(b) and 3—4(b)(1) permit separate prosecutions in multiple-murder cases, and venue was properly laid in Lake County for the murder of Marion Mueller, who died in a hospital in Waukegan, Lake County, and, originally, in McHenry County for the murder of Mary Lambert, who died in McHenry Hospital. (See Ill. Rev. Stat. 1979, ch. 38, par. 1—6(c) ("If cause of death is inflicted in one county and death ensues in another county, the offender may be tried in either county).") Since there was no direct evidence as to the location at which either Marion Mueller or Mary Lambert ingested the arsenic that caused their deaths, a decision to prosecute the two women's deaths separately in the two counties where their deaths occurred, pursuant to section 1—6, is beyond reproach. We find no basis for vacating defendant's death sentence either on grounds that the prosecutors acted arbitrarily and capriciously in manipulating

court dockets or on grounds of prosecutorial misconduct.

Defendant further argues that his death sentence must be vacated because the court considered defendant's conviction for the murder of M. J. Albanese, an offense that occurred after the murder of Marion Mueller, in determining his eligibility for the death sentence under the multiple-murder aggravating factor, section 9—1(b)(3). The court found that this aggravating factor was satisfied because defendant had previously been convicted of two murders in *Albanese I*, where the victims were Mary Lambert and M. J. Albanese. Marion Mueller died on August 18, 1980; Mary Lambert on August 6, 1980; and M. J. Albanese on May 16, 1981. Section 9—1(b)(3) provides that a defendant is eligible for the death sentence if he "has been convicted of murdering two or more individuals ***." Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3).

It is defendant's contention that the statutory phrase "has been convicted" is ambiguous because it may refer to either prior offenses or to prior convictions and that, given this ambiguity, we should narrowly construe the language and hold that it applies only to prior offenses. We disagree with defendant's assumption that the statutory phrase "has been convicted" is susceptible of more than one meaning. The statute speaks in terms of prior convictions, not prior offenses, leaving no room for judicial interpretation (*People v. Boykin* (1983), 94 Ill. 2d 138, 141). Considering that defendant's eligibility under section 9—1(b)(3) was also premised on his conviction for the murder of Mary Lambert, an offense that occurred prior to the murder of Marion Mueller and that this conviction, together with the murder conviction in the instant case, clearly satisfied section 9—1(b)(3), even under defendant's strained interpretation, we find that this argument borders on the frivolous.

Defendant next argues that this court should vacate his death sentence on the grounds that his decision to waive the jury at the sentencing hearing was not knowingly and intelligently made since the record does not disclose whether he was informed that a jury's decision to impose the death penalty must be unanimous. The record does reflect that defendant signed a typewritten jury-waiver form, with handwritten changes indicating that it was adapted to apply to a sentencing proceeding under the death penalty statute, and also includes the following discussion of defendant's oral waiver:

"MR. KELLY [defense counsel]: Your Honor, I've discussed this matter with my client and we waive jury on the death penalty hearing, by his request. And I'd ask that this Court give me a week to prepare on that issue. Or at least to Friday. Could the Court hear it on Friday, possibly?

THE COURT: I don't want you to waive your right to a jury, which is a significant right, just for a matter of 24 hours or a day or something.

MR. KELLY: Oh, no, no, it's not for that reason at all. I've discussed this with my client at length and he feels that this jury basically knows all the facts of the other cases and that they would all be admitted, obviously, in a death penalty hearing, and we would just as soon have the Court determine that issue. And it isn't my conception, it's his. Is that right, Mr. Albanese?

MR. ALBANESE: That's right.

THE COURT: The law provides that proceedings shall be conducted before the jury that determined the defendant's guilt, which we have here, or before a new jury impaneled for that purpose if there can be a showing for good cause if they should be discharged, or before the Court alone if the defendant waives a jury for the separate proceedings.

And you're telling me now, Mr. Albanese, you want to waive the jury?

MR. ALBANESE: Yes, your Honor.

THE COURT: Then that means that I will hear the evidence—

MR. ALBANESE: Yes.

THE COURT: And I will make that decision myself.

MR. ALBANESE: Yes, that's right.

THE COURT: You understand that after talking with your counsel?

MR. ALBANESE:, Yes. I do.

THE COURT: Because once I let this jury go home, then that's it and it will be up to me, you understand that?

MR. ALBANESE: Yes, I do.

THE COURT: Okay. Then at the defendant's request, the jury is waived. We'll call the jury in and discharge them.

Do you need more time to think about it, now?

MR. ALBANESE: No."

Defendant notes that in *People v. Brownell* (1980), 79 Ill. 2d 508, 536, this court declined to adopt a rule that would have expressly required our trial courts to inform all defendants of the unanimity requirement before accepting waivers of juries at capital sentencing hearings, and he urges that we now establish such a rule. We decline to do so and hold that the sixth amendment requires no precise formula for determining whether a waiver has been knowingly and intel-

No. 57660 People v. Albanese

ligently made. Each case will turn on its own facts and circumstances. (*People v. Taylor* (1984), 101 Ill. 2d 508, 520; *People v. Richardson* (1965), 32 Ill. 2d 497, 499.) The above-quoted discussion indicates that defendant conferred with his attorney at length before waiving the right and that the court questioned him closely about whether he wanted the court alone to determine the sentence. Moreover, less than six months before he executed the waiver in this case, defendant had been convicted of murder and sentenced to death by another jury in *Albanese I* on a related indictment and so became familiar with the jury's function at the sentencing hearing. Thus, we find that the oral and written waivers were effective.

Although we are satisfied that the facts and circumstances of this case demonstrate that defendant's waivers were knowingly and intelligently made, we suggest to trial judges that it would be preferable if, before accepting a jury waiver at a capital sentencing hearing, they would inform defendants that a sentencing jury would have to unanimously decide that the State has proved beyond a reasonable doubt the existence of a statutory aggravating factor and that there are not sufficient mitigating factors established to preclude the death sentence. We emphasize that, although this procedure is not constitutionally required, its implementation will eliminate post-trial and appellate argument as to the sufficiency of an otherwise valid waiver.

Defendant next argues that his death sentence should be vacated because various remarks of the trial judge indicated that he imposed the sentence because the court interpreted the statute to require a death sentence where it is determined that there are no mitigating factors sufficient to preclude its imposition. He contends that a sentence of death may be imposed only where, in addition to this statutorily required determination, the sentencing authority determines that death is the appropriate punishment.

Defendant cites the plurality opinion in *Lockett v. Ohio* (1978), 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2964, and *State v. Wood* (Utah 1982), 648 P.2d 71, 83, as support for the addition of an appropriateness standard. In *Lockett*, four justices held the Ohio death penalty statute invalid under the eighth and fourteenth amendments because it did not permit the sentencing authority to consider nonstatutory mitigating circumstances. The Illinois death penalty statute does not limit the sentencing authority to consideration of specified

statutory factors (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(c)), thus satisfying the rule in *Lockett*.

Ironically, defendant's proposed two-tier sentencing determination would graft onto our statute a rule which would jeopardize its constitutionality. Throughout his briefs, defendant has argued strenuously that his death sentence should be vacated because it was imposed in an arbitrary and capricious manner in violation of the eighth amendment. If we were to approve his proposal to add a second "appropriateness" tier to the sentencing process, the vagueness resulting from the use of that term as a final test for determining whether defendants should receive death sentences would inject such an element of uncertainty into the proceedings that death sentences might well be imposed in the arbitrary and capricious fashion condemned as cruel and unusual punishment in *Furman v. Georgia* (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726.

Moreover, assuming that the court interpreted the death penalty statute as defendant contends, he did so correctly, for this court recently held, in *People v. Ouvens* (1984), 102 Ill. 2d 88, 113-14, that a court must impose the death sentence where it has found no mitigating factors sufficient to preclude the death penalty under the statutory directive of section 9—1(h) (Ill. Rev. Stat., 1983, ch. 38, par. 9—1(h)).

Defendant next argues that the court erred in allowing into evidence at the sentencing hearing certain testimony of defendant's brother, Michael Albanese, which described how his family's life had been affected by knowledge of defendant's plot to have John Saltz murder Michael and his wife. The court conducted a unitary sentencing hearing; *i.e.*, after all the evidence had been submitted the court made both the finding under section 9—1(b)(3) that defendant was eligible for the death sentence due to his multiple-murder convictions and, pursuant to section 9—1(h), a finding that there were no mitigating factors sufficient to preclude imposition of the death sentence. Michael Albanese testified that, as a result of his knowledge of defendant's plot against his family, his home and office were under police surveillance; that he and his wife no longer left home in the evening without their children; that his children were not permitted to receive any telephone calls at school; and, because his mother is afraid, she has lived with his family from time to time.

Defendant correctly notes that in *People v. Davis* (1983), 97 Ill. 2d 1, 27-28, we vacated the death sentence due, in part, to the introduction of evidence regarding a victim's

family during the first phase of a bifurcated sentencing hearing, in which the jury was to determine whether there was proof beyond a reasonable doubt of a statutory aggravating factor. We held that in the first, or eligibility, phase in which the ordinary rules of evidence apply, it is particularly important that a jury's determination be uninfluenced by passion or prejudice. However, this case is distinguishable from *Davis* in two respects: the evidence here did not concern the family of the victim in this case, Marion Mueller, and the sentencing authority here was the court, rather than a jury.

Defendant cites *People v. Owens* (1984), 102 Ill. 2d 88, to the effect that evidence regarding nonstatutory aggravating factors may be admitted only after the court or a jury "is satisfied beyond a reasonable doubt that the State has proved a statutory aggravating factor." (102 Ill. 2d 88, 109.) The certified copies of defendant's prior murder convictions were the first items of evidence admitted at the sentencing hearing, and once these were before the judge he would have been justified in concluding that the section 9—1(b)(3) factor had been satisfied. Although he did not announce this conclusion before proceeding to hear the testimony at issue here, there can be no doubt that both parties were aware that defendant was eligible for the death sentence once that evidence had been admitted. We are satisfied that no error occurred here, but we think it would be preferable, although not constitutionally required, for the court to state its finding on defendant's eligibility for the death sentence under section 9—1(b) (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(b)) before proceeding to hear evidence in mitigation or nonstatutory evidence in aggravation under section 9—1(c) (Ill. Rev. Stat. 1983, ch. 38, par. 9—1(c)). We note that defendant does not dispute the relevance of Michael Albanese's testimony as evidence of a nonstatutory aggravating factor admissible to assist the sentencing authority to determine whether the particular facts of this case warrant imposition of the death penalty once defendant's eligibility for that sentence has been determined. See *People v. Free* (1983), 94 Ill. 2d 378, 424-26, which holds that evidence pertaining to the victim's family is admissible for this purpose.

Defendant also advances various constitutional challenges to the death penalty statute. He argues that the death penalty statute violates the eighth and fourteenth amendments to the United States Constitution because, when considered in conjunction with sections 104—22 and 104—26(b) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1981, ch. 38, pars. 104—22, 104—26(b)), it results in an arbitrary and capricious imposition of the death penalty. Section 104—22 essentially provides that where a defendant's fitness to stand trial is at issue because of an inability to understand the proceedings or assist in his defense the court should determine whether special provisions or assistance would render the defendant fit to stand trial. Section 104—26(b) states that if a defendant was found fit to stand trial if given this special assistance, he cannot be sentenced to death. Because defendant interprets section 104—22 to include non-English-speaking individuals, and these two statutes, taken together, establish a class of persons who can never receive the death penalty, he urges that such a classification is without any rational basis. He contends that this allegedly irrational classification infects the death penalty statute, causing death sentences pronounced thereunder to be imposed in an arbitrary and capricious manner, constituting cruel and unusual punishment. We do not agree.

We discussed this question in some detail this term in *People v. Stewart* (Oct. 19, 1984), No. 56629, and there held that the "provisions in article 104 clearly are not related to the needs of an accused who simply is non-English-speaking." (Slip op. at 24.) We explained that there was no indication that the unfitness with which article 104 was concerned was intended by the legislature to include an inability to speak or understand English. There is no need for further consideration of the issue here.

Defendant also contends that unless the statute requires the sentencing authority to specify in writing the aggravating factor or factors upon which the death sentence was based or, in the alternative, unless the statute requires the State to give pretrial notice of all aggravating evidence which it intends to introduce, it violates the eighth and fourteenth amendments. For the first alternative requirement, defendant relies upon *Barclay v. Florida* (1983), ____ U.S. ____, 77 L. Ed. 2d 1134, 103 S. Ct. 3418, in which the Supreme Court upheld the imposition of the death penalty under the United States Constitution, although the trial judge considered a nonstatutory aggravating factor in making the sentencing decision, a practice which Florida law prohibits. The Florida statute examined in *Barclay* requires the sentencing court to specify in writing the findings upon which a sentence of death is based. For the alternative proposition that our statute must furnish pretrial notice of all aggravating factors which the State intends to introduce, defendant

relies upon *Zant v. Stephens* (1983), ___ U.S. ___, 77 L. Ed. 2d 235, 103 S. Ct. 2733. In *Zant*, the Supreme Court upheld the Georgia death penalty statute against a challenge that the sentencing authority's discretion was not sufficiently guided because the statute contains no guidelines for weighing aggravating and mitigating circumstances. The Georgia statute contains a requirement that limits evidence of aggravating circumstances to that made known to the defendant prior to trial. Although the Florida and Georgia statutes under review in *Barclay* and *Zant* include the two provisions upon which defendant bases his argument, in upholding the constitutionality of these statutes, the Supreme Court did not rely upon the particular provisions which defendant cites. Thus, we decline to depart from our own decisions which have upheld the constitutionality of our death penalty statute under the eighth and fourteenth amendments. See *People v. Free* (1983), 94 Ill. 2d 378, 427, *cert. denied* (1983), ___ U.S. ___, 78 L. Ed. 2d 175, 104 S. Ct. 200.

He further argues that we should reconsider decisions in which we have upheld the death penalty statute against the following alleged constitutional deficiencies: absence of sufficient information-gathering procedures to ensure adequate appellate review, absence of a requirement that the State prove beyond a reasonable doubt that there are no mitigating factors sufficient to preclude the death sentence, and that the statute improperly vests the prosecutor with discretion whether to seek the death penalty. We have repeatedly declined to reconsider these arguments, and we continue to adhere to our previous decisions. See *People v. Gacy* (1984), 103 Ill. 2d 1, 103-05; *People v. Owens* (1984), 102 Ill. 2d 88, 114-15; *People v. Eddmonds* (1984), 101 Ill. 2d 44, 68-69; *People v. Garcia* (1983), 97 Ill. 2d 58, 80-82, and cases cited therein.

For the reasons stated, we affirm the judgment of the circuit court of Lake County. The clerk of this court is directed to enter an order fixing Tuesday, March 12, 1985, as the date on which the sentence of death entered in the circuit court is to be executed. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and to the wardens of the Illinois State Penitentiary at Menard and Joliet.

Judgment affirmed.

CHIEF JUSTICE RYAN, specially concurring:

My colleague, Justice Simon, in three capital cases, has emphasized that three members of this court, Justice Clark, Justice Goldenhersh and I, originally dissented from the holding of the majority in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, which case upheld the constitutionality of our death penalty statute. Justice Simon made this point in *People v. Lewis* (1981), 88 Ill. 2d 129, 185 (Simon, J., dissenting), *People v. Silagy* (1984), 101 Ill. 2d 147, 185 (Simon, J., concurring in part and dissenting in part), and now in this case, *People v. Albanese* (Simon, J., concurring in part and dissenting in part). It is, apparently, my colleague's position that his vote against our death penalty statute, added to that of the three who dissented in *Cousins*, means that a majority of this court, as now constituted, is now of the opinion that our death penalty statute is not valid. In these cases, my colleague has chided the three dissenters in *Cousins* for continuing to adhere to the holding of the majority in that case despite our "belief that the death penalty statute is unconstitutional."

My colleague errs when he asserts that I now believe that our death penalty statute is unconstitutional. That was my opinion at the time the opinion in *Cousins* was adopted. I stated in my dissent the reason for my belief. Four members of this court did not agree with my reasoning and held that the statute was constitutional. I must accept the fact that my opinion was wrong because four members of this court said it was wrong. In reality, the judicial process does not deal in abstract propositions of right and wrong. The decision of the majority in *Cousins* is binding not because of the concept that it is right or correct as a proposition of law, but because it is the final statement on that issue made by the highest judicial tribunal that has considered it. That is the nature of the appellate process. That is the manner in which cases and issues are decided. Simply because I dissent in a case does not mean that I must forever insist that I was right and the majority was wrong, or that "everyone was out of step except me."

The holding in *Cousins* is the law of this State unless it is reversed by a United States Supreme Court holding that our statute is unconstitutional. As noted in the quotation from Justice Traynor's article in Justice Clark's concurrence in this case, having noted my dissent, I must yield to the obligation that is upon me to live with the law as it has been stated. I therefore accept the law as stated in *Cousins*. It is

therefore inaccurate to say that I now believe that our death penalty statute is unconstitutional. Since the decision in *Cousins*, I have authored several opinions upholding our death penalty statute, citing the decision of this court in *Cousins* as authority for so doing. Also, I have concurred in the holdings of several opinions of my colleagues which have done likewise.

I am just as anxious as my colleague to have the Supreme Court pass on the constitutionality of our statute. I would have liked to have had our decision in *Cousins* reviewed by that court. Again, in *People v. Lewis*, we thoroughly discussed all of the issues that had been raised challenging the validity of our statute and, in a sense, invited the Supreme Court to review the case. To date, the Supreme Court has not seen fit to grant certiorari in any of the cases in which this court has upheld the imposition of the death penalty. I am sure that at some time in the future our statute will be reviewed, and a determination at that time will be made as to its validity.

There are 39 capital cases now pending in this court. We cannot wait until the Supreme Court finally passes on our statute before reviewing these cases. This would create an unmanageable backlog of death penalty cases in this court. We have reviewed 37 capital cases since the *Cousins* decision prior to this term of court. If we would have reviewed no capital cases after *Lewis*, the first case in which the imposition of the death penalty was affirmed, and if we would have waited for a decision of the Supreme Court in that case on the validity of the statute, we would now have a backlog of 75 capital cases. That figure would no doubt exceed 100 before *Lewis* finally works its way to the Supreme Court by way of *habeas corpus*.

Besides the judicial-administration consideration of the backlog problem, common decency requires that we review these cases as rapidly as possible. Of the 37 capital cases we have reviewed prior to this term of court, the penalty of death has been vacated in 20 of those cases. Those individuals upon whom the death penalty will not be imposed deserve to know their fate as soon as possible. It would be unconscionable to needlessly subject them to the uncertainty of their fate until the Supreme Court finally passes on the constitutionality of our statute.

Until the Supreme Court does act, we must continue to apply the law as enacted by the legislature and upheld by a majority of this court. Those of us who dissented in *Cousins*

cannot now do as my colleague urges in this case, go back and adopt our original assertion that the statute is invalid. As noted above, we have already reviewed 37 capital cases and upheld the death penalty in 17, applying the law as stated in *Cousins*. We cannot now flip-flop back to our prior contention that the statute is unconstitutional. The people of this State are entitled to more stability in the law than that.

Even if the three dissenters in *Cousins* were to join my colleague and declare our death penalty statute unconstitutional, that would not end the controversy. My colleague is philosophically opposed to the death penalty. If our legislature were to reenact a death penalty statute which could be subject to no possible constitutional challenge, I am sure my colleague would not vote to apply it. In the 37 capital cases we have so far reviewed, he has not voted to impose the death penalty in a single case in which he has participated. In the 17 cases in which the death penalty has been upheld, he has not voted in favor of the penalty in a single case in which he has participated. His dissent has not always been on constitutional grounds. In *People v. Free* (1983), 94 Ill. 2d 378, 434, *People v. Kubat* (1983), 94 Ill. 2d 437, 513, *People v. Davis* (1983), 95 Ill. 2d 1, 54, and *People v. Stewart* (1984), 101 Ill. 2d 470, 499, my colleague did not mention in his dissents any objection to the constitutionality of the statute, but argued that the penalty should be set aside on other grounds.

I therefore suggest that we get on with the business of this court and review the cases before us without needlessly cluttering up the opinions with dissents that do nothing more than chide three members of this court for following the law as announced by the majority in *Cousins*. If my colleague wishes to adhere to his position that the statute is unconstitutional, he may do so by simply noting his dissent for the reasons stated in *Lewis* without continuing to remind three members of this court that they have at one time held a similar belief. This is all that his dissent in this case accomplishes.

When the Supreme Court passes on the validity of our statute, I will be very pleased, whatever the decision may be, because the issue will then be settled. I will naturally follow that holding as the final statement of the law on the question of the validity of our statute, as I have followed the holding of the majority in *Cousins*, which is now the final statement of the law on that question. However, if the Supreme Court upholds the validity of our statute, in view of

his philosophical opposition to the death penalty, I wonder if my colleague will continue to insist that our statute is unconstitutional.

JUSTICE CLARK, specially concurring:

At this time I would like to reiterate my position concerning the constitutionality of the death penalty. I disagree with my colleague, Justice Simon, regarding the applicability of the legal doctrine of *stare decisis* when a constitutional issue is raised. I joined in Justice Ryan's dissent in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 544, *cert. denied* (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603, the first case in which this court found our death penalty statute to be constitutional. Since dissenting in that case, there have been numerous cases where I have either participated in, or authored, opinions where the death penalty has been in issue. As I stated in my concurrence in *People v. Lewis* (1981), 88 Ill. 2d 129, 169-70,

> "It is my considered opinion that, having once expressed my disagreement with an opinion of the court and then having followed such opinion in a case which was decided shortly after, it would be inconsistent to reverse my position simply because a new justice has joined this court. I agree with the view expressed by my distinguished colleague in his dissent that the doctrine of *stare decisis* does not mean that the law is immutable and rigid. On the contrary, I am a firm believer in the continuing evolution of our law and of the requirement that it change to meet changing circumstances. I think, however, that the circumstances which warrant changes in the law do not include changes in personnel. Rather, the circumstances I consider significant enough to bring about changes in the law are those which render an existing rule of law impracticable or unjust and which will bring about a sensible and just result. When those circumstances are present, I will vigorously vote to change the law.
>
> I think, however, that a serious mistake would be made if, at this juncture, this court overruled *People ex rel. Carey v. Cousins* and struck down the death penalty statute. An opportunity to strike down the act was passed up two years ago. In the interim, several other opinions have approved the procedure whereby the prosecutor requests a death sentence hearing. Were we to declare the act void now, those opinions would stand for naught. They were the result of a great deal of deliberation by this court and represent our best efforts to offer lucid instruction on this exceedingly difficult issue. It would be grossly unfair to the citizens of the State and members of the General Assembly

> that, rather than declare the act unconstitutional when the first opportunity arose in *People ex rel. Carey v. Cousins*, we permited prosecutors, the General Assembly, the judiciary, and criminal defendants, as well as the citizens of Illinois, to rely on our pronouncement that the act was constitutional. If we were to decide now, four years after passage of the act, and after so many persons sit on death row, that the act is unconstitutional, a great disservice to the stability of the law would be perpetrated by this court. Such a result would indicate that this court does not decide issues based on the law, but based instead on who happens to be sitting on the court at a particular time."

In December of this year, our distinguished colleague, Justice Underwood, will be retiring from this court. With his leaving, a new justice will be elected to this court. We do not know how the newest member of this court will vote on this or any other issue. Again, I believe that a change in personnel should not be the impetus to change the law.

At this juncture, I feel compelled to again quote an appropriate statement made by Mr. Justice Traynor. In my concurrence in *Lewis* I stated:

> "Finally, I agree with Mr. Justice Traynor's statement that once a judge has dissented, he is obligated to follow the law as pronounced. The respected jurist and scholar wrote:
>
> 'Paradoxically the well-reasoned dissent, aimed at winning the day in the future, enhances the present certainty of the majority opinion, now imbedded in the concrete of resistance to the published arguments that beat against it. For that very reason the thoughtful dissident does not find it easy to set forth his dissent.
>
> Once he has done so he has had his day. He should yield to the obligation that is upon him to live with the law as it has been stated. He may thereafter properly note that he is concurring under compulsion, abiding the time when he may win over the majority, but he should regard dearly enough the stability of the law that governs all the courts in the state not to renew the rataplan of his dissent. When the trial court properly follows the declared law and is duly affirmed by the intermediate court, he should not vote for a hearing on the basis of his dissent. Conversely, should the trial court be reversed on the basis of his dissent, he should vote for a hearing. When the court has granted a hearing in a case with muliple issues, including the ancient one, and there is a nucleus of dissenters on other issues, he should not cast his vote on the basis solely of his ancient dissent to achieve a reversal or affirmance that would not otherwise have material-

ized. To do so would only work mischief. The judge's responsibility to keep the law straight is not less when he is a dissenter.' Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218-19 (1957)." 88 Ill. 2d 129, 170-71.

JUSTICE SIMON, concurring in part and dissenting in part:

I concur in the majority's judgment that the defendant's conviction for murder should be affirmed, but I dissent from the decision to impose the death penalty. For the reasons set forth in my separate opinions in *People v. Lewis* (1981), 88 Ill. 2d 129, 179 (Simon, J., dissenting), and in *People v. Silagy* (1984), 101 Ill. 2d 147, 184 (Simon, J., concurring in part and dissenting in part), I have concluded that the Illinois death penalty statute violates the United States and Illinois constitutions. In *Lewis* I expressed the view that the application of *stare decisis* in cases involving the Constitution and the death penalty is improper. In *Silagy* I examined the limits of *stare decisis* as it has been applied by the United States Supreme Court; that court's practice supports my position regarding the propriety of the doctrine's application in this context.

In addition to the violation of due process that is inherent in the posture of the members of this court who continue to adhere to the majority decision in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, despite their belief that the death penalty statute is unconstitutional, other constitutional difficulties result from this application of *stare decisis*. First, the application of the doctrine violates the supremacy clause of the United States Constitution, which provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, par. 2.

To enforce the Constitution is "imperative upon the state judges in their official *** capacities. *** They [are] not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—'the supreme law of the land.' " (*Martin v. Hunter's Lessee* (1816), 14 U.S. (1 Wheat.) 304, 340-41, 4 L. Ed. 97, 106.) These principles have been settled since *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 2 L. Ed.

60. See *United States v. Nixon* (1974), 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090.

The supremacy clause establishes the primacy of the Federal Constitution, the provisions of which override all conflicting law, as well as extralegal doctrines having no constitutional basis or significance. *Stare decisis* is such a doctrine. At present, however, three members of this court, having expressed their belief that the death penalty statute of this State offends the Federal Constitution, refuse because of *stare decisis* to join me in invalidating that statute. They have thereby exalted *stare decisis* to a position above the Constitution, and allowed a doctrine having no constitutional basis or significance to override the affirmative constitutional guarantee of due process. The result is a clear violation of the supremacy clause.

Second, application of *stare decisis* in this context violates the State supremacy doctrine. Several opinions of this court establish a supremacy doctrine in State law. In *People ex rel. Miller v. Hotz* (1927), 327 Ill. 433, it was argued that awarding a writ of *mandamus* requiring the county clerk to issue an order appointing a day for the election of a new State's Attorney as required by the State Constitution was discretionary with the courts. This court said:

> "This is an amazing argument ***. The constitution is the supreme law, and every citizen is bound to obey it and every court is bound to enforce its provisions. It is a most extraordinary doctrine that the court has a discretion to enforce or not enforce a provision of the constitution according to its judgment as to its wisdom or whether the public good will be subserved by disregarding it." 327 Ill. 433, 437.

The position of the members of this court who refuse to invalidate the death penalty statute because of *stare decisis* is a decision not to enforce the separation-of-powers provision of the State Constitution on the ground that the public good in the form of stability and predictability in the law is served by disregarding that provision—precisely the kind of judgment this court forbade in *Hotz*. (See also *People v. Humphreys* (1933), 353 Ill. 340, 342; *Coalition For Political Honesty v. State Board of Elections* (1976), 65 Ill. 2d 453, 460.) These cases establish that Illinois' own supremacy doctrine forbids subordinating State constitutional provisions to a doctrine having no State constitutional dimension.

Moreover, this court has specifically acknowledged that the doctrine of *stare decisis* must yield to State constitu-

Moreover, this court has specifically acknowledged that the doctrine of *stare decisis* must yield to State constitutional considerations. In *Neff v. George* (1936), 364 Ill. 306, this court stated in reference to one of its prior opinions:

> "While in arriving at our decision no specific reference was made to [the] doctrine [of *stare decisis*], we were fully cognizant of it and of the fact that *it is not universally applicable to all situations without exception. The doctrine has more or less force, according to the nature of the question decided.* *** Stability and uniformity of decisions conduce so much to the public welfare and happiness, that when a rule of law has once been settled, *contravening no statute or constitutional principles*, it ought to be followed ***." (Emphasis added.) *Neff v. George* (1936), 364 Ill. 306, 308-09.

Thus, *stare decisis* can apply only when State constitutional provisions are not thereby contravened.

I therefore dissent from the decision to impose the death penalty in this case for the reasons stated here as well as those set forth in my separate opinions in *Lewis* and *Silagy*.

Addendum

The Chief Justice's specially concurring opinion was delivered to me only moments before the opinions in this case were made public. Because I was unable to respond to his remarks in the customary manner, I am now filing these additional observations.

The reasons I have set forth in this dissent for declaring our current death penalty statute unconstitutional have not previously been stated in any opinion filed in this court. I regret that instead of addressing these new constitutional arguments, the Chief Justice dismisses them as "needlessly cluttering up" the opinion of the court (slip op. at 26 (Ryan, C.J., specially concurring)).

A judge of this court has both the right and the duty to discuss new ideas on issues that are relevant to cases before the court. A dissent is more than a statement of disagreement; it provides an opportunity for the reexamination of troublesome questions. Discreet silence may foster collegiality, but it does not enhance the resolution of difficult problems. Only the continuing and vigorous airing of conflicting viewpoints can assure the correct resolution of such hard questions as the constitutionality of the present death penalty statute.

The primary function of a State supreme court is to declare what is correct as a matter of law, and to reverse prior

errors in the interpretation and application of the law, including its own. Public confidence in our judicial system rests in large measure on the expectation that the appellate process will function in this manner. The Chief Justice states, however, that "[t]he decision of the majority in *Cousins* is binding *not because of the concept that it is right or correct as a proposition of law*, but because it is the final statement on that issue made by the highest judicial tribunal that has considered it." (Emphasis added.) Slip op. at 24 (Ryan, C.J., specially concurring).

This statement implies that ours is a system of footrace justice in which the first opinion entered prevails simply because it is first in time, and not necessarily because it is correct. While reliance on precedent is a useful and important device in our common law system, if a reviewing court fails to correct its own errors, but relies instead on a mechanical application of *stare decisis*, there can be no justice, for no other institution in our society is empowered to interpret and apply the Constitution to laws that are challenged.

Cousins is this court's final statement on this issue only as long as a majority of the court chooses to so regard it. It is unrealistic to regard such a complex issue as closed while academics and the bar are still developing new approaches to the issue. If this court erred in *Cousins*, it is our obligation to correct that error, especially because the death sentence is involved and the United States Supreme Court has thus far refused to review our death penalty statute.

The Chief Justice also states that it is no longer accurate to say that he believes the statute is unconstitutional. He does not state, however, that he now believes it is constitutional, nor that if given the opportunity of deciding *Cousins* today, he would uphold the statute. Rather, he says that he accepts the fact that his dissent in *Cousins* was wrong "because four members of this court said it was wrong." (Slip op. at 24.) Apparently he feels compelled to uphold *Cousins*, not because he believes it was correct, but because he believes that the doctrine of *stare decisis* requires him to do so. In this classic confrontation between the doctrine of *stare decisis* and constitutional principles, however, the supremacy clause of the United States Constitution requires that constitutional principles prevail. That is what this dissent says.

It is an extraordinary view of *stare decisis* that requires a reviewing court to perpetuate a previously announced holding if that holding is wrong. *Stare decisis* does not re-

quire a judge to surrender his belief in a correct legal position for an incorrect one, particularly when the death sentence and essential constitutional principles are at stake. If a correct constitutional position were rendered forever incorrect merely because four judges once said it was, then our system of justice would not be one of laws, but one of men; not one of principle, but one of chance.

Relying upon a law review article published 26 years ago, the Chief Justice declares that I have already had my say on the constitutionality of our death penalty statute, and suggests that I should hereafter limit myself in dissenting to noting my position in *Lewis*. In response, I point out that Justice Traynor, the author of the frequently quoted law review article, never intended his views on the role of *stare decisis* to apply to death penalty cases. Eight years after his article was published, Justice Traynor adopted an earlier admonition by Judge Jerome Frank:

> " 'In criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend.' " *People v. Aranda* (1965), 63 Cal. 2d 518, 530, 407 P.2d 265, 272, 47 Cal. Rptr. 353, 360, quoting *United States v. Delli Paoli* (2d Cir. 1956), 229 F.2d 319, 323 (Frank, J., dissenting).

But it is too late to mend when a death sentence has been carried out. For that reason we should heed another of Judge Frank's admonitions, that "stare decisis should not govern in [illegible]ase *** where a man's life is involved." *United States ex rel. Fong Foo v. Shaughnessy* (2d Cir. 1955), 234 F.2d 715, 718.

Since I have never proposed that this court postpone review of all death sentences until the United States Supreme Court rules on our death penalty statute, I do not understand the Chief Justice's judicial administrative backlog discussion. To defer the review of death penalty cases in this court is obviously impractical, and I see no reason to do so. If this court overrules *Cousins* or the Supreme Court invalidates our statute, the cases in which this court has upheld the death sentence will be remanded to the circuit courts for resentencing. That would hardly create an unmanageable problem. If, as Justice Goldenhersh has observed, the people of Illinois want an effective death penalty (*People v. Lewis* (1981), 88 Ill. 2d 129, 166 (Goldenhersh, J., concurring)), it is our duty to inform them of the defects in the particular statute passed by the General Assembly. We do a disservice to all if we blind ourselves to the unconstitutional features of

our current statute, which may on a later day be struck down.

Finally, the Chief Justice attributes my disagreement with the majority to a "philosophical opposition" to the death penalty and a consequent reluctance on my part to enforce that sentence. However, I have never expressed such a view. The Chief Justice is mistaken in his supposition that I would not uphold the death penalty even if the United States Supreme Court found no constitutional infirmity in the statute. When I took my oath of office, I swore to support the constitutions of the United States and the State of Illinois. I have no intention of departing from that oath.

Death penalty cases are difficult and painful for all of us who sit on this court. Each of us must act as he believes the constitution and his oath of office require.

57660

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

November 30, 1984

RECEIVED
DEC - 3 1984
OFFICE OF THE
STATE APPELLATE DEFENDER
SUPREME COURT UNIT

Mr. Charles M. Schiedel
State Appellate Defender's Office
200 E. Monroe, S#200
Springfield, IL 62701

No. 57660 - People State of Illinois, appellee, v. Chrales Michael Albanese, appellant. Appeal, Circuit Court (Lake).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Enclosed please find a corrected copy of page 19 to the opinion.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on December 7, 1984.

APPENDIX C

Argument from Original Brief to Illinois Supreme Court

IX.

THE ILLINOIS DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT ARBITRARILY AND CAPRICIOUSLY LIMITS APPLICATION OF THE DEATH SENTENCE TO DEFENDANTS WHO DO NOT REQUIRE TRANSLATORS OR OTHER ASSISTANCE TO BE FIT FOR TRIAL.

Ill.Rev.Stat., 1981, Ch. 38, Sec. 104-22 states:

> Trial with special provisions and assistance. (a) On motion of the defendant, the State or on the court's own motion, the court shall determine whether special provisions or assistance will render the defendant fit to stand trial as defined in Section 104-10.
>
> (b) Such special provisions or assistance may include but are not limited to:
>
> (1) Appointment of qualifying translators who shall simultaneously translate all testimony of trial into language understood by the defendant.
>
> (2) Appointment of experts qualified to assist a defendant who because of a disability is unable to understand the proceedings or communicate with his or her attorney.

Ill.Rev.Stat, 1981, Ch. 38, Sec. 104-26(b) states:

> (b) A defendant convicted following a trial under Section 104-22 shall not be subject to the death penalty.

The plain effect of these provisions is to exempt from the death penalty those individuals who require a translator at trial because they speak a language other than English or have a disability that prevents them from communicating without assistance, such as an individual with impaired hearing who would require a sign language translator. The death penalty authorized by Section 9-1 only applies to members of a select group, which is comprised of those who speak English and do not require

assistance to understand the proceedings against them or assist in their defense.

Membership in this group bears absolutely no relationship to a defendant's crime or culpability. The Illinois death penalty is cruel and unusual in violation of the Eighth and Fourteenth Amendments in light of the limited punishments available for those who, by no relevant or rational considerations, are not members of the designated group.

In Furman v. Georgia, 408 U.S. 238, 310, 92 S.Ct. 2726, 33 L.Ed.2d 346, 390 (1972), Justice Stewart recognized in his concurring opinion that under the statutory scheme in question the death sentence was not consistently imposed for all rapes and murders. Although Justice Stewart could not discern the basis for selection of those who would or would not die he stated that:

> ...the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.
>
> Furman v. Georgia, 402 U.S. at 310.

Justice Stewart reasoned that where the death sentence is imposed arbitrarily upon a selected group, while others are spared whose crimes are equally reprehensible, those death sentences amount to cruel and unusual punishment. Furman v. Georgia, 408 U.S. at 309.

In his concurring opinion in Furman Justice Douglas reasoned that the Eighth Amendment requires legislatures to write appeal laws that are evenhanded, nonselective, and nonarbitrary. Justice Douglas further stated that:

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less that $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.
>
> Furman v. Georgia, 408 U.S. at 359.

The Illinois death penalty system, which singles out one group for execution, that being those who speak and understand English, employs a freakish criterion for imposition of the death penalty. The law capriciously spares individuals who are members of the favored non-English speaking group, even though their crimes and characters may be as reprehensible as those of English speaking individuals who are condemned to electrocution. Clearly there is no rational basis for singling out individuals for execution on the grounds that they speak and understand a certain language. Just as members of a specified racial or income group cannot be selected for or exempted from the death penalty, neither can the group of English speaking people, to which Charles Albanese belongs, be singled out for the ultimate punishment.

In People v. Davis, ___ Ill.2d ___, ___ N.E.2d ___ (No. 54790; June 17, 1983), this Honorable Court rejected this argument as applied to defendant Davis because the offending provisions were not in effect at the time of his offense. Davis, supra, slip opinion at 13-14. The offense charged against Mr.

Albanese, by contrast, occurred in August, 1980. The effective date of sections 104-22 and 104-26(b) was December 28, 1979.

For these reasons the Illinois Death Penalty statute violates the Eighth and Fourteenth Amendments, and Mr. Albanese's sentenced should be reversed.

III.

THIS COURT FAILED TO ADDRESS PETITIONER'S ISSUE THAT THE ILLINOIS DEATH PENALTY STATUTE IMPERMISSIBLY DISCRIMINATES AGAINST DEFENDANTS WHO DO NOT REQUIRE SIGN LANGUAGE OR TACTILE-SENSE TRANSLATION, OR OTHER SUCH ASSISTANCE TO BE FIT FOR TRIAL.

In Argument IX of his original and reply briefs, petitioner Charles Albanese contended that his death sentence violates the proscription against cruel and unusual punishment because the death sentence is only authorized for defendants who do not require translators or other assistance to be fit for trial. (Defendant-Appellant's original brief at 90-93) In its slip opinion of October 19, 1984, this court rejected petitioner's argument with respect to non-English speaking individuals, because it found that the statutory exemption at issue in section 104 does not pertain to persons unable to speak or understand English. People v. Albanese, slip op. at 21-22 (No. 57660, October 19, 1984). This court should grant rehearing because it completely failed to address petitioner's contention that section 104 exempts persons who "have a disability that prevents them from communicating without assistance, such as an individual with impaired hearing who would require a sign language translator," and that this exemption creates an irrational criterion for application of capital punishment and renders the statute unconstitutional. (Defendant-Appellant's brief at 90)

This court erred apparently because it perceived that petitioner Albanese's argument claimed discrimination only with respect to individuals who were fit for trial but spoke a

language other than English. Slip op. at 22. Although Mr. Albanese did argue that such discrimination rendered his death sentence unconstitutional, he also argued specifically that his sentence was unconstitutional because a like sentence could not be considered for persons "who would require a sign language translator" or other such "assistance to understand the proceedings against them or assist in their defense." (Defendant-Appellant's brief at 90-91; see also State's brief at 97-100, and Defendant-Appellant's reply brief at 16-17) Therefore the conclusion that petitioner was incorrect in asserting that non-English speaking persons were among those exempted by section 104 from application of the death penalty statute did not answer petitioner's argument. The exemption of persons who require sign language translation or other such assistance to be fit for trial, who are exempted by section 104, also establishes an unconstitutional criterion for application of the death penalty, as Mr. Albanese has contended. This court therefore should grant rehearing.

APPENDIX D

Excerpt from People v. Stewart,
Ill.Sup.Ct. No. 56629 (10/19/84), pending publication

The defendant says that the death penalty statute violates the eighth amendment's (U.S. Const., amend. VIII) prohibition of cruel and unusual punishment in that it arbitrarily and capriciously permits imposition of the death sentence as to English-speaking defendants while exempt-

ing non-English-speaking defendants who, under section 104—22 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1981, ch. 38, par. 104—22), require assistance to understand trial proceedings. See Ill. Rev. Stat. 1981, ch. 38, par. 104—16(b).

Section 104—22 of article 104 of the Code provides, in the part relevant here:

> "(a) On motion of the defendant, the State or on the court's own motion, the court shall determine whether special provisions or assistance will render the defendant fit to stand trial as defined in Section 104—10.
>
> (b) Such special provisions or assistance may include but are not limited to:
>
> (1) Appointment of qualified translators who shall simultaneously translate all testimony at trial into language understood by the defendant.
>
> (2) Appointment of experts qualified to assist a defendant who because of a disability is unable to understand the proceedings or communicate with his or her attorney.
>
> ***." Ill. Rev. Stat. 1981, ch. 38, par. 104—22.

Section 104—26(b) of the same article provides that a defendant who is convicted following a trial under section 104—22 shall not be eligible for the death penalty. See Ill. Rev. Stat. 1981, ch. 38, par. 104—26(b).

The defendant complains that section 104—26(b) unconstitutionally exempts from application of the death penalty those persons who under section 104—22 require special provisions or assistance in order to be fit to stand trial as defined in section 104—10. The latter provision declares that "[a] defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." Ill. Rev. Stat. 1981, ch. 38, par. 104—10.

It should be observed that article 104 concerns a defendant's fitness for trial, to plead, or to be sentenced, and that it became law in 1979 through the enactment of Senate Bill 133. The General Assembly debates indicate that Senate Bill 133 was introduced because of the bizarre case of Donald Lang (see *People v. Lang* (1979), 76 Ill. 2d 311), an illiterate deaf mute accused of two murders. Although Lang was not in need of medical treatment, he had "virtually no ability to communicate with other people in any recognized language system." (76 Ill. 2d 311, 316.) Since it could not be said that Lang was under a mental disability, the provisions of the Mental Health and Developmental Disabilities Code (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 1—100 *et seq.*) which would have provided medical care, shelter, and training were inapplicable. Senate Bill 133, which became article 104, was intended to fill "the glaring gap in the present statutory framework of our criminal justice system as it relates to unfit defendants" (Rep. Lee Daniels, House Debates at 75, June 19, 1979) by rendering the defendant fit to stand trial through assistance or by requiring a hearing to ascertain the defendant's fitness and indicated future treatment for him. The bill provided, *inter alia*, for fitness-for-trial examinations of the accused by a physician, clinical psychologist, psychiatrist, or other expert; detailed, written examination reports and progress reports by the medical expert; periodic hearings to determine fitness; medication; and discharge hearings for persons who cannot be rendered fit to stand trial through special provisions or assistance under section 104—22. These provisions in article 104 clearly are not related to the needs of an accused who simply is non-English-speaking. The problem of defendants who are simply non-English-speaking is met by section 1 of "An Act relating to the appointment of interpreters ***" (Ill. Rev. Stat. 1979, ch. 38, par. 165—11), which provides for interpreters for defendants without an adequate understanding of English.

Clearly the subject of article 104 is fitness for trial. Section 104—10 provides that a person is unfit if because of his mental or physical condition he cannot understand the proceeding and assist in his defense.

There is no indication that "physical or mental condition," as used in section 104—10, was intended by the legislature to include an inability to speak or understand English. The ability or inability to speak or understand English is not mentioned in article 104. Nor is there anything in the debates of the General Assembly to indicate that the legislature considered non-English-speaking defendants to have a mental or physical disability. It surely would be an absurdity to contend, to use an improbable illustration, that the legislature intended that if a foreign legislator, lawyer or professor, were to be convicted of a capital offense, for example, that he could not be considered for the death penalty simply because he did not understand English and required a translator at trial.

Interpreters for defendants who do not understand English had been, and are, provided by statute, as we have

noted. (Ill. Rev. Stat. 1979, ch. 38, par. 165–11.) To construe section 104–22 as providing for translators to assist non-English-speaking defendants would unreasonably ignore the existence of section 1.

Considering the obvious purpose and intendment of article 104, it seems clear from the language that section 104–22 is not to be limited to instances of non-English-speaking defendants. It would appear that it would include communication by way of sign language, tactile-sense recognition and similar avenues.

On January 18, 1982, the defendant was convicted of having murdered Willie Fredd and Albert Pearson on January 27, 1981, and he was sentenced to death for those crimes. (People v. Stewart (appeal docketed Mar. 12, 1982), No. 56332.) His appeal from those convictions and sentences is currently in the briefing stage in this court. He contends here that if we were to reverse either conviction on that appeal, i.e., 56332, we would be obliged to vacate the sentence of death that is the subject of this appeal. This is so, he says, because the People in the prosecution involved here introduced evidence of the defendant's convictions in cause No. 56332 of the murders of Fredd and Pearson as additional aggravating factors at the sentencing hearing following conviction for the murder of Kevin Kaiser.

The contention is a speculative one and should not be a ground for deferring the affirmance of the conviction and sentence here. In light of the possibility the defendant points out, however, we shall not at this time fix a date for the imposition of sentence. When we enter judgment in cause No. 56332 we shall enter an appropriate order in this case regarding the sentence.

For the reasons given, the judgment of the circuit court of Winnebago County is conditionally affirmed, and jurisdiction is retained pending disposition of the appeal in cause No. 56332.

Judgment conditionally affirmed;
jurisdiction retained.

JUSTICE SIMON, concurring in part and dissenting in part:

I agree that the convictions for murder should be affirmed in this case. However, for the reasons set forth in my separate opinions in *People v. Lewis* (1981), 88 Ill. 2d 129, 179 (Simon, J. dissenting), in *People v. Silagy* (1984), 101 Ill. 2d 147, 184 (Simon, J., concurring in part and dis-

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES M. ALBANESE, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

NOTICE AND PROOF OF SERVICE

TO: Honorable Alexander L. Stevas
Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

Neil F. Hartigan
Attorney General
188 W. Randolph, Suite 2200
Chicago, IL 60601

Mr. Fred Foreman
State's Attorney
Lake County Courthouse
18 North County Street
Waukegan, IL 62259

Mr. Charles M. Albanese
Register No. N-22283
P. O. Box 711
Menard, IL 62259

Please take notice that I have mailed the original and nine copies of the Petition for Certiorari to the Clerk of the above court and that I am serving the Attorney General and the State's Attorney each with three copies and I am serving the petitioner with one copy by depositing the copies in the mail in Springfield, Illinois, with sufficient prepaid postage and addressed as indicated above on this 29th day of January, 1985.

Theodore A. Gottfried
THEODORE A. GOTTFRIED
State Appellate Defender

COUNSEL FOR PETITIONER

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-6154

IN THE
UNITED STATES SUPREME COURT
October Term, 1984

CHARLES M. ALBANESE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

NEIL F. HARTIGAN
Attorney General
State of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

COUNSEL FOR RESPONDENT

JACK DONATELLI
Assistant Attorney General

Of Counsel

* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether Albanese's second death sentence was arbitrarily and capriciously imposed due to the fact that this case case to trial after he was already convicted of murdering his father and his wife's grandmother.

2. Whether Illinois' act permits arbitrary and capricious imposition of the death sentence because only those who are able to understand the proceedings initiated against them and able to assist in their own defense on the basis of their own faculties and capacities are eligible for the death sentence.

3. Whether the Illinois death penalty statute on its face permits arbitrary and capricious imposition of the death sentence where it grants prosecutors discretion in calling for a death penalty hearing and does not provide for proportionality review by the Illinois Supreme Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....

TABLE OF AUTHORITIES.....

OPINION BELOW.....

JURISDICTION.....

NATURE OF THE CASE.....

REASONS FOR DENYING THE PETITION:

I.

THERE WAS NO ARBITRARINESS IN ALBANESE'S SECOND DEATH SENTENCE DUE TO THE FACT THAT THIS CASE CAME TO TRIAL AFTER HE WAS ALREADY CONVICTED OF MURDERING HIS FATHER AND HIS WIFE'S GRANDMOTHER; HE WAS CONVICTED OF THREE MURDERS AND RECEIVED SENTENCES OF DEATH FOR TWO OF THESE CRIMES.....

II.

IN ILLINOIS, ONLY THOSE WHO ARE ABLE TO UNDERSTAND THE PROCEEDINGS INITIATED AGAINST THEM AND ABLE TO ASSIST IN THEIR OWN DEFENSE ON THE BASIS OF THEIR OWN FACULTIES AND CAPACITIES ARE ELIGIBLE FOR THE DEATH SENTENCE.....

III.

THE ILLINOIS DEATH PENALTY ACT, WHICH GRANTS PROSECUTORS DISCRETION IN CALLING FOR A DEATH PENALTY HEARING AND DOES NOT PROVIDE FOR PROPORTIONALITY REVIEW BY THE ILLINOIS SUPREME COURT, ON ITS FACE SAFEGUARDS AGAINST ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH SENTENCE.....

CONCLUSION.....

TABLE OF AUTHORITIES

Page

Free v. Illinois, 104 S.Ct. 200 (1983).....

Gacy v. Illinois, 105 S.Ct.__. (March 4, 1985).....

Gregg v. Georgia, 428 U.S. 153 (1976).....

Lewis v. Illinois, 102 S.Ct. 2307 (1982).....

People v. Gacy, 103 Ill.2d 1, 468 N.E.2d 1171 (1984).....

People v. Kubat, 94 Ill.2d 437, 447 N.E.2d 247 (1983).....

People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981)...

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984)..

People v. Stewart, 104 Ill. 2d 463 (1984).....

People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979).....

Profitt v. Florida, 428 U.S. 242 (1976).....

Woodson v. North Carolina, 428 U.S. 227 (1976).....

Ill. Rev. Stat. 1978 Supp., ch. 91 1/2, par. 1-100.....

No. 84-6154

IN THE
UNITED STATES SUPREME COURT
October Term, 1984

CHARLES M. ALBANESE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

PRAYER TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

The People of the State of Illinois ask this Court to deny the petition for writ of certiorari to review the judgment of the Supreme Court of Illinois which affirmed Charles Albanese's conviction for murder and sentence of death because Albanese does not present an issue worthy of review by this Court.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at People v. Albanese, 104 Ill. 2d 504 (1984).

JURISDICTION

The jurisdictional requisites have been set forth in Albanese's petition but, as treated fully in the following argument, the People of the State of Illinois maintain that petitioner has not provided any reason for this Court to exercise its discretion to grant his petition for writ of certiorari.

NATURE OF THE CASE

This is the second sentence of death that Charles Albanese has asked this Court to review. The first was based on his convictions for the murder of his father and his wife's grandmother and for attempting to murder his brother, all by arsenic poisoning. The convictions and sentence was affirmed by the Illinois Supreme Court in People v. Albanese, 464 N.E.2d 206 (1984) and this Court denied review on certiorari in Albanese v. Illinois, 105 S.Ct. 268 (1984).

Now Charles Albanese attacks his second sentence of death for the murder of his mother-in-law, Marion Mueller, also by arsenic poisoning. The petition is addressed only to the constitutionality of the Illinois death penalty statute; Albanese does not make an attack on his conviction.

REASONS FOR DENYING THE PETITION

I. THERE WAS NO ARBITRARINESS IN ALBANESE'S SECOND DEATH SENTENCE DUE TO THE FACT THAT THIS CASE CAME TO TRIAL AFTER HE WAS ALREADY CONVICTED OF MURDERING HIS FATHER AND HIS WIFE'S GRANDMOTHER; HE WAS CONVICTED OF THREE MURDERS AND RECEIVED SENTENCES OF DEATH FOR TWO OF THESE CRIMES.

Albanese first complains that the imposition of the death sentence for poisoning his mother-in-law was arbitrary due to the order of the two trials that resulted in his three murder convictions. He suggests two theories of arbitrariness -- first, a manipulation by the prosecution to delay this case until the two prior convictions were secured, or second, a fortuitous rate of progress through the court system that permitted the prior case to be completed first.

Neither theory has merit and each was rejected by the Supreme Court of Illinois. First, the court could find no evidence of prosecutorial misconduct in the record. Second, the Illinois court interpreted that the kind of fortuity Albanese was complaining of was not "arbitrary" as contemplated by this Court in Gregg v. Georgia, 428 U.S. 153 (1976) and Profitt v. Florida, 428 U.S. 242 (1976).

The Supreme Court of Illinois explained that Albanese's argument focused on the procedure by which capital cases reach trial, an area that does entail some "chance factors" but would be impossible to review. However, "arbitrariness," as proscribed by the eighth amendment's ban on cruel and unusual punishment, must focus on the decision-making process of the sentencer after the trial is over and guilt is determined.

For instance, Justice Stewart wrote in Gregg that the problem of arbitrary imposition of the death penalty "can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg, 428 U.S. 153 (1976); Profitt, supra.

Albanese was sentenced under such a "carefully drafted statute," one that Illinois enacted directly in response to this Court's prohibition against arbitrary and capricious application of the death sentence and one that the Illinois Supreme Court has consistently upheld as suitably restricting the discretion of the sentencing authority under the eighth amendment ban against cruel and unusual punishment. The "fortuity" involved in Albanese's cases did not violate the Eighth Amendment.

In addition, the Illinois court rejected any notion that the prosecution manipulated the docket in the two cases so as to amount to professional impropriety under Illinois' ethical canons. The statement that Albanese relied on in the Illinois Supreme Court and now in this Court -- a newspaper quote from a Lake County prosecutor that "we want to have a second conviction on him as a back-up" -- was actually a response to an inquiry as to why more public funds should be spent on a second trial of a man already sentenced to death.

Indeed, the court characterized the prosecution's handling of the two separate posecutions as "beyond reproach." The reason that there were two separate trials was because the Albanese I victims, Albanese's father and his wife's grandmother, each died in McHenry County, Illinois, whereas the

Albanese II victim, Albanese's mother-in-law, died in Lake County. In Illinois, murders are tried either where death is inflicted or where death ensues. Ill. Rev. Stat. 1979, ch. 38, par. 1-6(c). Since there was no direct evidence as to where either his wife's grandmother or his mother-in-law ingested the arsenic, the decision by authorities to prosecute the two women's deaths in the separate counties where death occurred was the proper decision. Therefore, the Illinois Supreme Court found no basis for vacating Albanese's second death sentence on either the ground that the prosecutor manipulated the court docket or the ground of prosecutorial misconduct.

The People of Illinois maintain that there is no reason for this Court to accept review on this issue. There was no arbitrariness in Albanese's sentence -- he has three convictions for murder and was sentenced to death for two of these crimes. The petition should be denied.

II. IN ILLINOIS, ONLY THOSE WHO ARE ABLE TO UNDERSTAND THE PROCEEDINGS INITIATED AGAINST THEM AND ABLE TO ASSIST IN THEIR OWN DEFENSE ON THE BASIS OF THEIR OWN FACULTIES AND CAPACITIES ARE ELIGIBLE FOR THE DEATH SENTENCE.

The Illinois death act provides that certain persons who are found unfit as being unable to understand the nature and purpose of the proceedings against them or to assist in their own defense are not subject to the death penalty. Ill. Rev. Stat. 1981, ch. 38, par. 104, et seq. Albanese challenges this provision as discriminatory under the eighth and fourteenth amendments.

In the present case, the Supreme Court of Illinois relied on its analysis of People v. Stewart, 104 Ill. 2d 463 (1984) to reject Albanese's argument. Albanese, 104 Ill.2d at 540. The court in Stewart explained that this provision was the Illinois legislature's response to the case of Donald Lang, an illiterate deaf mute who was accused of two murders but had virtually no ability to communicate with other people in any recognized language system. While it was recognized that Lang was not able to understand the proceedings against him, he was not mentally disabled as contemplated by Illinois' Mental Health and Developmental Disabilities Code (Ill. Rev. Stat. 1978 Supp., ch. 91 1/2, par. 1-100, et seq.). Lang fell within a gap and the legislature closed the gap in paragraph 104.

The court analyzed that this provision was not meant for non-English speaking defendants as Albanese suggested. These persons were covered by the provisions in Ill. Rev. Stat. 1979, ch. 38, par. 165-11 by which foreign language interpreters may be appointed. Rather, paragraph 104 is concerned with those defendants with whom communication is possible only "by way of sign language, tactile-sense recognition and similar avenues." Stewart, 104 Ill.2d at 502. These are defendants who are first found unfit to stand trial and can become fit only when provided special assistance that acts to compensate in some degree for their disability.

While Illinois will hold these defendants responsible for their crimes, it will not subject them to the penultimate penalty. In other words, if some translator developed some language system with which to communicate with a Donald Lang-type, that defendant could stand trial but could not receive the death penalty.

The policy is obvious. This Court has recognized that since the days of the common-law rule when a mandatory death sentence was imposed on all convicted murderers, the class of murderers to be punished by death has gradually narrowed. Gregg v. Georgia, 428 U.S. 153, 176-177 (1976). Thus, Illinois holds only certain murderers, not all murderers, eligible for the death sentence. Among those eligible are murderers who are able to understand the proceedings initiated against them and able to assist in their own defense on the basis of their own faculties and capacities. Though artificial devices and third-party intervention may provide a disabled defendant with enough understanding of a proceeding against him that a

conviction and term of years may lie, a sentence of death requires a level of integrity even beyond that of fitness for trial. This higher level of integrity compels its own distinction between those fit for the severest penalty and those not.

This fit/unfit distinction is like the over-18/under-18 distinction and not like a rich/poor or white/black distinction. Fitness, like age but unlike money and race, relates to a defendant's culpability, mental state, and ability to stand trial. Illinois has determined that no matter how valuable the special assistance is, the disabled defendant will be at a disadvantage. For example, should he give testimony at trial or at sentencing, the content may be conveyed with the assistance of a third party or an artificial device but the intangibles such as demeanor, attitude, and tone of voice, which invariably impact on the sentencer's assessment of character and credibility may be lost.

Illinois permits the death sentence in only the rarest and extreme cases and makes every effort to ensure the capital defendant has every opportunity to defend himself. It is not arbitrary or capricious, nor cruel or unusual, to remove an element of risk in the choice between life and death. The exemption in paragraph 104 obviates the risk inherent in the compensating procedures. This reflects Illinois' goal of a death penalty in accord with the dignity of man, Gregg, 428 U.S. at 173, and the fundamental respect for humanity. Woodson v. North Carolina, 428 U.S. 227, 304 (1976).

Therefore, this provision of the death penalty act is in keeping with the Constitution and there is no reason presented by Albanese for this court to accept review in this cause.

III. THE ILLINOIS DEATH PENALTY ACT, WHICH GRANTS PROSECUTORS DISCRETION IN CALLING FOR A DEATH PENALTY HEARING AND DOES NOT PROVIDE FOR PROPORTIONALITY REVIEW BY THE ILLINOIS SUPREME COURT, ON ITS FACE SAFEGUARDS AGAINST ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH SENTENCE.

Albanese assails the Illinois death act on its face as permitting too much discretion to prosecutors and not providing for proportionality review.

The Supreme Court of Illinois has consistently rejected these claims and upheld the constitutionality of its statute, convinced that the Illinois act safeguards against arbitrary and capricious imposition. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979); People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981); People v. Kubat, 94 Ill.2d 437, 447 N.E.2d 247 (1983); People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984); People v. Gacy, 103 Ill.2d 1, 468 N.E.2d 1171 (1984). It refused Albanese's request that it reconsider it prior decisions. The Court has now affirmed twenty death sentences rendered under the Illinois death statute.

This Court has also had the chance to review the constitutionality of the Illinois act and has repeatedly declined to review petitions for writ of certiorari where these same issues were presented. Lewis v. Illinois, 102 S.Ct. 2307 (1982); Free v. Illinois, 104 S.Ct. 200 (1983). Indeed, beginning in May of 1982 (see Gaines v. Illinois, 102 S.Ct. 2285), this Court has let stand eighteen Illinois death sentences challenged in petitions for writ of certiorari. Most recently, this court declined to accept review of the challenges Albanese now makes as they were presented in Gacy v. Illinois, 105 S.Ct.__, (March 4, 1985).

Accordingly, the People of the State of Illinois maintain that Albanese's claims have no merit for the reasons explained by the Illinois Supreme Court in Carey, Lewis, Kubat, Silagy, Gacy, and the instant case. We ask this Court to again decline to review these challenges to the Illinois death penalty statute.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

COUNSEL FOR RESPONDENT

JACK DONATELLI
Assistant Attorney General

Of Counsel

* Counsel of Record

OPINION

(4)

SUPREME COURT OF THE UNITED STATES

CHARLES M. ALBANESE *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 84–6154. Decided April 15, 1985

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Charles Albanese was convicted of murder and sentenced to death. On appeal to the Illinois Supreme Court, Albanese argued that the Illinois death penalty statute violated the Eighth and Fourteenth Amendments because of the broad, post-trial discretion granted each of Illinois' 102 State's Attorneys on whether to seek the death penalty following a conviction for a capital offense.

Under the Illinois statute, the decision whether to convene a death hearing rests solely in the hands of the individual Illinois State's Attorney. Ill. Rev. Stat., ch. 38, § 9–1(d). As a result, the statute vests in each State's Attorney freewheeling discretion to select, among potential capital defendants, those who may be subject to the death penalty. It allows each of the 102 State's Attorneys to establish his own policy, or no policy at all, by which to exercise this discretion. The scheme thereby introduces into the penalty phase an element of completely unbridled discretion and invites wholly arbitrary decisionmaking. It does so at the phase of the proceeding at which clear statutory guideposts and carefully channeled discretion are absolutely necessary to preserve the constitutionality of a capital sentencing scheme. See *Zant* v. *Stephens*, —— U. S. ——, —— (1983); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion).

Even if I did not continue to believe that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J.,

dissenting), I would grant certiorari in this case. As I have said before, I believe that this aspect of the Illinois scheme poses a serious constitutional question that is worthy of this Court's consideration. See *Eddmonds* v. *Illinois*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari). I therefore dissent from the Court's refusal to consider the merits of this case.